No. 21-771

In The
Supreme Court of the United States

JUSTIN HERRERA,

Petitioner,

v.

TERESA CLEVELAND, SAMUEL DIAZ,
AND ENRIQUE MARTINEZ,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF OF FORMER JAILHOUSE LAWYERS AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTERESTS OF THE AMICI CURIAE[1]

Shon Hopwood is an Associate Professor of Law at Georgetown University Law Center and an advocate for criminal justice reform. Shon served nearly eleven years in federal prison where he learned the law and wrote two successful petitions for writ of certiorari to the Supreme Court of the United States. He litigated over 100 cases for *pro se* litigants during his time in prison.

T. Haller Jackson IV served half of his sentence at the Louisiana State Penitentiary (commonly known as Angola) as a "Louisiana Department of Public Safety and Corrections Regulation B-05-004 Offender Counsel Substitute." Prior to his incarceration, he was a term law clerk to Judge Jacques L. Wiener, Jr. of the United States Court of Appeals for the Fifth Circuit, Chief Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit, and Chief Judge Helen G. Berrigan and Judge Susie Morgan of the United States District Court for the Eastern District of Louisiana. Before and after those clerkships he practiced at Cravath, Swaine, and Moore LLP in New York and Gibson, Dunn, and Crutcher LLP in Los Angeles. He is author or co-author of a dozen scientific papers and his sovereign immunity scholarship has been cited by the Iowa Supreme Court. Mr. Jackson's contrasting

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[1] *Amici* file this brief with the consent of the Parties, who received timely notice. This brief has been authored entirely by *Amici*'s counsel, and no person or entity funded the preparation or submission of this brief besides *Amici* or their counsel. *See* Sup. Ct. R. 37.6.

experiences as a "street lawyer" and a department-sanctioned "jailhouse lawyer" allow him to confirm what the cases cited in the brief already prove: *pro se* prisoners are in a substantially worse position than defendants to identify their tortfeasors, because of the legal structures enacted to govern their claims, the realities of defendants' institutional position, and defendants' sometimes-legitimate but often-not responses to litigation.

Daniel Manville is the Director of the Civil Rights Clinic, Clinical Professor, at Michigan State University Law College. He was incarcerated in the 1970s when the rights of prisoners were first being recognized by the courts and litigated many issues in that endeavor. After his confinement, he went to Antioch School of Law, Washington, D.C., and became an attorney after a legal battle that took over five years and two appearances before the D.C. Court of Appeals. These decisions have assisted many other former offenders to achieve their dream of becoming litigators and advancing the rights of prisoners. Professor Manville is an author and co-author of numerous litigation manuals that provide guidance to those imprisoned in litigating conditions of confinement issues. His best-known manual is the *Prisoners' Self-Help Litigation Manual*.

Brandon Sample is a licensed attorney in Vermont who practices in federal courts around the United States. He is also the founder and Executive Director of Prisology, a non-profit organization dedicated to criminal justice reform. Prior to Brandon's

licensure as an attorney, Brandon was incarcerated in federal prison from 2000-2012. Brandon litigated numerous cases against the Bureau of Prisons while incarcerated and assisted other prisoners as a jailhouse lawyer.

Paul Wright is the founder and director of the Human Rights Defense Center, a national non-profit organization that advocates for criminal justice reform. He is also the founder and editor of Prison Legal News which has reported monthly, since 1990, on legal developments and news impacting prisoners and their families. While imprisoned in Washington state between 1987 and 2003 Mr. Wright litigated numerous *pro se* cases on his own behalf and assisted prisoners in dozens of civil rights and post-conviction cases spanning all areas of conditions of confinement mostly in federal court. Mr. Wright was the National Jailhouse Lawyer Vice President of the National Lawyers Guild between 1995 and 2007.

Christopher Zoukis, author of the *Directory of Federal Prisons*, *Federal Prison Handbook*, *Prison Education Guide*, and *College for Convicts*, is the Managing Director of the Zoukis Consulting Group, a boutique federal prison consultancy. He is a law student at the University of California, Davis School of Law, where he is a *UC Davis Law Review* Articles Editor and Trial Practice Honors Board member. He is also the vice president of the Criminal Law Association and Students Against Mass Incarceration. While imprisoned in the Federal Bureau of Prisons between 2006 and 2017, Mr. Zoukis assisted other prisoners in

dozens of conditions of confinement lawsuits and habeas corpus petitions, primarily in federal courts and Virginia state courts.

SUMMARY OF THE ARGUMENT

As Justin Herrera has argued in his cert petition, a meaningful and entrenched division between two positions exists in Circuit application of F.R.C.P. 15(c)(1)(C) regarding relation back of amended complaints naming previously Doe-captioned defendants after the statute of limitations. *Amici* urge the Court to grant Herrera's petition because of their particular experience in a category of litigants especially harmed by the (incorrect) interpretation of the rule applied by the Seventh, as below, and the other Circuits on the majority side of the split: *pro se* prisoners asserting civil rights claims. *Pro se* prisoner plaintiffs face a number of important barriers to identifying officers who violate their constitutional rights and holding those officers accountable in civil litigation. Many of those barriers require incarcerated plaintiffs to identify correctional defendants by detail in Doe-captioned complaints and substitute names later. Allowing incarcerated plaintiffs to substitute names for otherwise well-identified Doe-captioned defendants ensures that courts do not treat them worse than their non-incarcerated counterparts. And instead of preventing manipulation, the categorical exclusion provides windfall advantages to correctional defendants in a system that

already protects the interests served by statutes of limitations better than any relation-back rule could.

This case is exceptionally important because without a rule allowing relation back, the legal structures of and practical obstacles to litigation by *pro se* incarcerated plaintiffs will prevent many prisoners from ever having civil rights claims—even meritorious ones that they pursue diligently—adjudicated on the merits in federal courts. Existing rules already do much to stack the deck against prisoners. Long before litigation, mandatory administrative grievances put prisons on notice almost immediately of potential claims against them. Prisons retain exclusive control over videos, staff logs, and other documentation so that they—but not the plaintiffs they incarcerate—are aware of which officers were involved in which potential legal violations. They also retain the ability to transfer incarcerated plaintiffs, which separates them from their possessions (including any evidence they had gathered), distances them from potential witnesses, and removes them from the physical location where they could do some modicum of fact-gathering.

Even once litigation has begun, rules unique to *pro se* incarcerated plaintiffs make identifying defendants difficult. Defendants regularly refuse to turn over documents on security grounds, do not permit depositions as a matter of course, and at times simply refuse to engage in the discovery process entirely. The Federal Rules of Civil Procedure single out incarcerated plaintiffs as not entitled to initial disclosures, and such plaintiffs are not permitted to serve defendants—or,

consequently, start the clock for scheduling order deadlines—until they pass a screening for frivolousness, which often takes months or even years. While the categorical exclusion position suggests that permitting "relation back" would allow plaintiffs to manipulate limitations periods, it is prison defendants, not plaintiffs, who currently engage in such manipulation; while prison defendants are put on notice almost immediately, plaintiffs, no matter how diligently they act, may not be able to learn the identity of individual defendants within the statute of limitations.

As former jailhouse lawyers who have continued to work on prison civil rights issues, *Amici* understand these barriers as well as anyone. The obstacles are less well known to people who do not regularly litigate prison civil rights cases. *Amici* discuss them here to underscore the importance of certiorari in this case, and to urge the Court to grant the petition and resolve the split in authority in favor of allowing relation back when plaintiffs substitute the names they learn in discovery for otherwise well-identified Doe-captioned defendants.

ARGUMENT

I. Correctional defendants' stated interests receive far more protection from the structure of *pro se* prison litigation than from any aspect of the statute of limitations.

The practical justifications for the categorical exclusion position bear little relation to the legal or

empirical reality of prisoner civil rights suits. Both the Prison Litigation Reform Act ("PLRA") and internal rules set by prison administration serve correctional defendants' stated interests far better than any statute of limitations could. The PLRA requires administrative exhaustion under prison grievance systems, allowing prison defendants themselves to set the timeline by which *pro se* prisoners must notify them of potential claims—and prison systems typically require prisoners to file initial grievances within weeks, not years. Beyond the PLRA, the internal procedures of prison administration ensure that prison defendants have more information about the events giving rise to a potential lawsuit than prisoners do. Taken together, prison defendants receive far more notice than virtually any other defensive litigant even before the filing of a lawsuit, whereas incarcerated *pro se* plaintiffs have far less access to information and records to support those suits than any other plaintiff.

The PLRA protects prison defendants' interests in receiving notice of claims in a timely manner far more effectively than statutes of limitations. The PLRA requires prisoners to exhaust available administrative remedies before filing a civil suit. 42 U.S.C. § 1997e(a). Available remedies vary across jurisdictions because prison systems create their own administrative remedy regimes. *Jones v. Bock*, 549 U.S. 199, 218 (2007). Prison systems establish far more truncated timelines to file a grievance than the relevant jurisdiction's statute of limitations to file a civil lawsuit; several prison systems set the deadline to make grievances known as

quickly as within days of the incident in question. Michigan Law Prison Information Project, *Prison and Jail Grievance Policies: Lessons from a Fifty-State Survey* 22 (2015), https://tinyurl.com/y3gj5xm7 (noting that Michigan has a two-day deadline and Nebraska and Oklahoma have three-day deadlines for an initial grievance). None is longer than ninety days. *Id.* This means that prison defendants effectively set their own statutes of limitations, and set them far sooner than any applicable statute of limitations. *See*, *e.g.*, *Johnson v. Johnson*, 385 F.3d 503, 519 (5th Cir. 2004) (holding that a prisoner could sue about only some sexual assaults among many, based on the grievance time limit).

Prison defendants' control of the prison system consolidates the advantage they derive from that advance notice. Prisons may set out the degree of factual specificity a prisoner must meet in describing the events giving rise to his grievance. *Bock*, 549 U.S. at 219. Prisons can thus require prisoners to describe the events giving rise to a potential claim in far more granular detail than would be required to overcome a motion to dismiss in a civil suit. And because they control the timeline, prison systems can ensure that they will receive that detailed notice shortly after the events in question—notice that allows them to check and preserve relevant video evidence, use staff rosters to identify the individuals involved, interview those individuals and other possible witnesses, and locate and preserve any available evidence. *See Reyes v. Smith*, 810 F.3d 654, 658-59 (9th Cir. 2016) (discussing prison officials' knowledge of involved staff based on

internal records); *see also Glick v. Walker*, 385 F. App'x 579, 582 (7th Cir. 2010) (describing injurious decisions made by prison employees identified by prison but insulated from prisoner's knowledge by "layers of bureaucracy").[2] Prisons may even create multiple processes for a potential *pro se* prisoner plaintiff to exhaust. *See Muhammad v. Mayfield*, 933 F.3d 993, 1001 (8th Cir. 2019) (requiring prisoner to seek redress from both grievance process and prison chaplain, independently). Such systems ensure that prisons have abundant information about events giving rise to a claim in advance of a filed complaint.

Prison defendants' exclusive control over the prison system ensures not only that they can collect that information expeditiously, but also that they remain better situated to identify the individual officers or staff involved in the events giving rise to a lawsuit. Prison defendants collect the aforementioned evidence and information and also maintain exclusive access to it. *See*, *e.g.*, *Billman v. Ind. Dep't of Corr.*, 56 F.3d 785, 789 (7th Cir. 1995) ("The state's attorney smiled when we asked him at argument whether [the plaintiff]

[2] This is to say nothing of more nefarious actions, such as intimidating potential *pro se* prisoner plaintiffs, *see Ross v. Blake*, 136 S. Ct. 1850, 1860 (2016), exerting pressure on possible prisoner witnesses, or coming up with a common cover story and supporting documentation. *See Kincaid v. Sangamon Cty.*, 435 F. App'x 533, 536-37 (7th Cir. 2011) (describing threats to prisoner and family from prison superintendent); *see also Ward v. Smith*, 721 F.3d 940, 944 (8th Cir. 2013) (Murphy, J., dissenting) ("What might originally have been characterized simply as a dispute over production of a videotape has grown into a wider conflict concerning potential spoliation. . . .").

would be given the run of the prison to investigate the culpability of prison employees for the rape."); *Smith v. Ind. Dep't of Corr.*, 871 N.E.2d 975, 988 (Ct. App. Ind. 2007) (discussing prison defendants' exclusive possession of video of cell extraction at issue in lawsuit).

Pro se prisoners, by contrast, cannot undertake such pre-complaint investigations. They do not have access to staff rosters, incident reports, witness statements, or video recordings when they write their grievances, or at any time before filing a lawsuit. *Billman*, 56 F.3d at 789 ("Billman is a prison inmate. His opportunities for conducting a precomplaint inquiry are, we assume, virtually nil."); *see also Kikumura v. Osagie*, 461 F.3d 1269, 1284 (10th Cir. 2006) (noting the inability of incarcerated persons to conduct investigations). *Pro se* prisoners must identify officers involved in incidents based solely on their own recollection or on the observations of other prisoners. *See*, *e.g.*, *Sulton v. Wright*, 265 F. Supp. 2d 292, 298 (S.D.N.Y. 2003) (citing *Valentin v. Dinkins*, 121 F.3d 72, 74 (2d Cir. 1997) (and emphasizing *pro se* prisoners' difficulty in identifying defendants)). This can often prove impossible —for example, incidents of excessive force by tactical units or groups of unfamiliar officers may involve pepper spray and other ocular irritants that obstruct prisoners' vision, leaving prisoners unable to identify the officers involved. *See Rodriguez v. Plymouth Ambulance Serv.*, 577 F.3d 816, 821 (7th Cir. 2009); *Palmer v. Bd. of Educ.*, 46 F.3d 682, 688 (7th Cir. 1995) (discussing plaintiff injured by actions of unknown member of collective group and the corresponding need for

discovery). Prison defendants, on the other hand, know exactly who responded and maintain a written record of the events in question.

II. The categorical exclusion rule applied by the Seventh, below, and the other majority Circuits effectively shortens the statute of limitations.

For even the most diligent prisoners who exhaust their facility's administrative exhaustion process efficiently but still need to identify the officers involved, the categorical exclusion rule effectively truncates the statute of limitations. Dissatisfied with the advance notice that they obtain because of the PLRA, correctional defendants regularly demand that courts effectively require prisoners to factor the amount of time that it takes them to obtain discovery of officer-defendants' names into their filing timeline to comply with the statute of limitations. The categorical exclusion rejects relation back without offering or citing any avenue for *pro se* prisoners to obtain defendant-identifying information prior to filing and discovery. That interpretation of the rule effectively shortens the statute of limitations for *pro se* prisoner plaintiffs, without justification.

Under the categorical exclusion interpretation of Rule 15(c)(1)(C), which bars relation back of amendments substituting correct names for Doe-captioned correctional defendants, *pro se* prisoner plaintiffs must collect all the information they need to identify

defendants by name within the statute of limitations. But as explained at length above in Section I, prison systems maintain exclusive control over the information that prisoners need to make such identification by name. And as discussed below in Section III, prison defendants routinely take every available action—both before and during litigation—to avoid providing that information to prisoner plaintiffs. *Pro se* prisoner plaintiffs often simply do not have ready access to name-identifying information prior to filing suit or for a lengthy amount of time after. *See Santiago v. Wells*, 599 F.3d 749, 765-66 (7th Cir. 2010) ("[A]lthough the district court apparently expected him to negotiate with prison officials with respect to his information needs, he hardly found a receptive, or cooperative, ear."); *see also Billman*, 56 F.3d at 790 ("[I]t is far more difficult for a prisoner to write a detailed complaint than for a free person to do so, and again this is not because the prisoner does not know the law but because he is not able to investigate before filing suit."). Even assuming prisoner plaintiffs can obtain the names of Doe officers in discovery—which is not a given, as explained below—that is generally the earliest time they may obtain that information.

Refusing relation back requires *pro se* plaintiffs, unlike any other civil litigants, to factor discovery time into their compliance with the statute of limitations. If a state, like Illinois and many others, has a two-year statute of limitations, *pro se* prisoners would need to file far enough in advance to account for the time required in discovery to obtain the names of

Doe-captioned officers so that their amended complaint substituting names could be filed within the original statute of limitations. And because prison defendants have so many more options for fighting discovery than regular litigants, *see infra* Section III, and because *pro se* prisoner plaintiffs' litigation efforts are limited by out-of-cell time, law library access,[3] and other factors, whatever discovery they obtain will take longer both to obtain and to process than discovery by other plaintiffs. *See*, *e.g.*, *Campbell v. Harris*, No. 11-CV-00021 (JLH) (JTR), 2011 WL 4625656, at *5 (E.D. Ark. Oct. 6, 2011) ("Rather than allowing Plaintiff access to his medical record and providing him with other relevant information he was entitled to receive in response to his written discovery, defense counsel has turned discovery into an exercise in 'pulling teeth.'"); *see also Banks v. Leslie*, No. 14-CV-381 (PP), 2015 WL 631285, at *1 (E.D. Wis. Feb. 12, 2015) ("[A]s of the time he wrote his motion, he was on administrative segregation and thus had limited access to the law library."). Far from forestalling an indefinite extension to the statute of limitations, categorically

[3] After this Court's decision in *Lewis v. Casey*, 518 U.S. 343 (1996), many prisoners have little or no access to law libraries at all. *See*, *e.g.*, *Lilly v. Jess*, 189 F. App'x 542, 543 (7th Cir. 2006) ("Prisoners in segregation legitimately lose access to amenities provided to prisoners in the general population; it would not be sensible (and is not required) for prisons to have two full law libraries, or to release prisoners from segregation (where considerations of punishment or safety require their confinement) to browse the open stacks of a general library. Prisoners who want complete access should behave themselves and earn a right to remain in the general population.").

excluding relation back effectively shortens it to as little as one year or even less time. And not every state has the two-year statute of limitations that Illinois does—several states have statutes of limitations that are only one year, making filing cases analogous to this one with Doe-identified defendants impossible. *See* Ky. Rev. Stat. § 413.140(1)(a); La. Civ. Code art. 3492; Tenn. Code § 28-3-104(a)(1)(A). This is all in service of forcing prisoner plaintiffs to identify correctional defendants by name rather than by shift time, rank, and other unique characteristics that already put prisons on notice as to their actual identities. *See Murphy v. Kellar*, 950 F.2d 290, 293 (5th Cir. 1992) (discussing clear identification via features rather than names).

III. *Pro se* jailhouse lawyers face enormous barriers to obtaining discovery, including information that would identify correctional defendants.

The categorical exclusion of relation back under the majority interpretation of Rule 15(c)(1)(C) only compounds existing barriers to *pro se* prisoner plaintiffs vindicating their constitutional rights in federal courts. While some of those barriers are attributable to the fact of incarceration and the strictures of the PLRA, others reflect prison defendants' deliberate efforts to stymie *pro se* prisoner plaintiffs. Court rules and other procedural rules exclude even the most diligent prisoner plaintiffs from initial disclosures, and prison defendants use their exclusive control of the grievance process and other prison records to prevent

prisoner plaintiffs from determining the names of officers involved in constitutional violations. When *pro se* prisoner plaintiffs file complaints against John Doe correctional officers and staff, prison defendants often use plaintiffs' incarcerated status to object to discovery that would reveal vital identifying information.

The interpretation that categorically excludes relation back also practically relies upon the implied willingness of prison defendants to provide the information required to identify Doe defendants by name expeditiously and within the statute of limitations. This is not the case.[4] Prison defendants regularly fight *pro se* prisoner plaintiffs' discovery requests tooth and nail, with great success. That fight happens both in the litigation process and in the correctional system itself. This Court should not allow prison defendants to benefit from their actions to stymie even diligent prisoner plaintiffs.

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[4] *See*, *e.g.*, *Redmond v. Leatherwood*, No. 06-CV-1242, 2009 WL 212974, *1-2 (E.D. Wis. Jan. 29, 2009) ("On December 18, 2007, the plaintiff served the defendants with requests for production of documents. On February 13, 2008, the plaintiff served the defendants with his first set of interrogatories. The plaintiff did not receive responses to either set of discovery requests. On March 25, 2008, the plaintiff sent a letter to the defendants' attorney advising that he would file a motion to compel if he did not receive discovery responses. The plaintiff's motion to compel was filed with the court on April 15, 2008. The defendants have not filed a response to the plaintiff's motion to compel [as of January 29, 2009].").

A. Prison defendants intentionally stymie even the most diligent prisoner plaintiffs and should not benefit from that obstruction.

Prison defendants do not typically turn over identifying information without a fight. In prisons, that fight involves several stages. It includes the many tools prison defendants have available during the mandatory grievance process, the exclusive control they have over the physical location and possession of the prisoner plaintiffs, and the litigation tactics prison defendants undertake—and the deference their arguments receive from courts—even after complaints have been filed.

First, prison defendants routinely decline to turn over required information during prison grievance processes. Correctional staff often restrict the grievance process itself, designing Kafkaesque systems, refusing to provide required materials, and declining to respond in a timely fashion or at all, all while rejecting grievances on narrow procedural grounds. *See*, *e.g.*, *Moore v. Lamas*, No. 12-CV-223, 2017 WL 4180378, *10-11 (M.D. Pa. Sept. 2, 2017) (describing designated correctional witness who could not describe how grievance system worked); *Williams v. Pollard*, No. 07-CV-1157, 2009 WL 3055334, *10 (E.D. Wis. Sept. 21, 2009) (describing a grievance system that requires mailing while not providing envelopes); *Campbell v. Cowen*, No. 11-CV-74, 2012 WL 1636996, *4 (N.D. Ind. May 9, 2012) (explaining that plaintiff could not exhaust administrative remedies because he was kept under conditions of total

darkness and deprived of writing materials). Prison systems and grievance officers generally do not voluntarily identify John Doe individuals named in prisoner grievances, even though they typically know who such individuals are because of their exclusive control of staffing rosters and videos. *See supra* Section I; *see also Hill v. Snyder*, 817 F.3d 1037, 1040 (7th Cir. 2016) (describing unprocessed grievance with the sole notation that a staff member "had viewed the video and is not able to verify this occurred").

Second, prison defendants exercise their complete control over prisoners and their possessions to stifle lawsuits before they are filed even where prisoners might have access to the information they need. Many prisoners who advance meritorious claims in the prison grievance process find themselves quickly transferred to other prisons. *See Hill v. Lappin*, 630 F.3d 468, 469 (6th Cir. 2010) ("Hill alleges that . . . prison staff placed him in segregated housing and threatened to transfer him to the lock-down unit at [USP] Lewisburg in retaliation for grievances that he had filed against the [prison] staff."). Such transfers may have retaliatory aspects—the new prison may be more dangerous, or less comfortable, in retaliation for pursuing legal process,[5] *see id.*—but crucially, such transfers also remove *pro se* prisoner plaintiffs from

[5] For federal prisoners, such retaliation remains illegal but is in practice irremediable as no equitable relief can cure the violation and most courts have found there is no *Bivens* damages remedy for it. *See*, *e.g.*, *Bistrian v. Levi*, 912 F.3d 79, 95-96 (3d Cir. 2018).

the scene of the events that gave rise to the lawsuit. Prisoners transferred away from the scene cannot attempt to identify officers by asking around or catching a glimpse of a name plate, nor can they collect information from witnesses. Often, they cannot even identify or maintain control of physical evidence because during such transfers, prisoners lose control of their possessions, which prison systems transfer separately from the prisoners themselves. Those separations—which often deprive prisoners of access to notes, legal research, witness declarations, grievance systems carbon copies needed to prove exhaustion, and other crucial materials—often last weeks or months, and prisoners have no recourse or ability to recover their possessions in the meantime.

B. *Pro se* prisoners do not have access to the full suite of discovery available to counseled plaintiffs.

Pro se prisoner plaintiffs also face high barriers to identifying John Doe correctional defendants, and prosecuting their claims more generally, because of court rules and the litigation tactics of correctional defendants. First, many courts apply different court rules to *pro se* prisoner plaintiffs, including rules that block them from accessing information that other plaintiffs—even counseled prisoner plaintiffs—receive from defendants in the ordinary course of litigation. Second, at the behest of prison defendants, courts often block *pro se* prisoner plaintiffs from receiving information in discovery—including, as relevant here, the

information that they need to identify Doe-captioned correctional defendants by name.

First, the structures of prison litigation prevent *pro se* prisoner plaintiffs from relying on normal litigation processes to identify Doe-captioned defendants. The Federal Rules of Civil Procedure exempt prison defendants from having to provide initial disclosures to *pro se* prisoner plaintiffs. Fed. R. Civ. P. 26(a)(1)(B)(iv). This exemption prevents prisoners from receiving exactly the information that they would need to fill in names of Doe-captioned defendants. *See* Fed. R. Civ. P. 26(a)(1)(A) (requiring parties to turn over as initial disclosures "the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses"). Many courts have other rules that place unique obstacles in front of *pro se* prisoners in discovery. *See*, *e.g.*, *Nelson v. Gleason*, No. 14-CV-870A, 2017 WL 2984430, at *1 (W.D.N.Y. July 13, 2017) ("Under this Court's Local Civil Rule, discovery for *pro se* cases is to be filed with this Court, unlike discovery in represented actions."); S.D.N.Y. & E.D.N.Y. L.R. 33.2(e) (explaining that only a few forms of discovery "shall constitute the sole form[s] of discovery available to" incarcerated *pro se* plaintiffs "[e]xcept upon permission of the Court, for good cause shown"). Courts often accompany those rules with precedent mandating weighing security concerns against discoverability, which by definition put *pro se* plaintiffs in the position of having to justify receiving documents that counseled

parties receive as matter of course. *See*, *e.g.*, *Ivey v. MSOP*, No. 12-cv-30 (DWF) (TNL), 2019 WL 3423573, at *4 (D. Minn. July 30, 2019) ("[T]he Court must attempt to craft a solution that allows Ivey access to the materials necessary to present his case while alleviating Defendants' security concerns. . . . The Court will therefore order that Defendants designate a representative who shall take possession of the disputed discovery."). This justification process takes time.

Second, prison defendants rely on court deference and their own security interests—real and purported—to avoid providing information to *pro se* prisoner plaintiffs in discovery. Prison defendants regularly object to even the most basic discovery requests, citing internal security, a desire to protect correctional officers, the danger of having discovery materials in the hands of prisoners, and other bases. *See*, *e.g.*, *Naranjo v. Thompson*, 809 F.3d 793, 798 (5th Cir. 2015) (explaining that plaintiff "was barred from viewing and responding to discovery that defendants had filed under seal due to security concerns"); *Brooks-Bey v. Reid*, No. 91-CV-2726, 1992 WL 3589, at *2 (E.D. Pa. Jan. 7, 1992) (explaining prison defendants refused to turn over a document necessary to prove plaintiff's case on unexplained security grounds); *Miller v. Lusk*, No. 11-CV-03365 (RBJ) (BNB), 2013 WL 4510222, at *2 (D. Colo. Aug. 26, 2013) (describing prison defendants' blanket objection to written discovery on the basis of purported security concerns). Unlike counseled parties in other contexts, *pro se* prisoners typically do not get to take depositions of correctional defendants without court

intervention. *See*, *e.g.*, *McKeithan v. Jones*, 212 F. App'x 129, 131 (3d Cir. 2007) (per curiam) (discussing court discretion to authorize prisoner depositions and describing plaintiff's request for an oral deposition, which the court rejected, as "unorthodox"). And courts, which generally defer to prison defendants' and government counsel's descriptions of prison security needs, regularly decline to order such depositions for incarcerated *pro se* plaintiffs. When prisoners are forbidden from taking depositions, they lose the ability to ask witnesses under oath about (among other things) the identity of Doe-captioned defendants. Similarly, correctional defendants regularly refuse to turn over rosters, camera footage, and other records that might allow prisoner plaintiffs to identify Doe-captioned defendants, and courts accept their security justifications in upholding those refusals. *See*, *e.g.*, *Gilmore v. Lockard*, No. 12-CV-00925 (LJO), 2015 WL 5173170, at *5-6 (E.D. Cal. Sept. 3, 2015) (denying inmate's request for housing roster because doing so would purportedly compromise institutional security).

These burdens fall particularly heavily on *pro se* prisoner plaintiffs. Prison defendants cite security concerns far more effectively against uncounseled, incarcerated prisoners. Courts and correctional defendants alike openly acknowledge that prisoners are prohibited from receiving some discovery that would otherwise be produced to counseled parties. *E.g.*, *White v. Jindal*, No. 13-CV-15073, 2016 WL 1275401, at *2 (E.D. Mich. Apr. 1, 2016) (discussing "certain documents" that "would need to be produced for attorney's eyes

only"); *see also Santiago*, 599 F.3d at 765 ("The treatment afforded him by the defendants was not, it is safe to say, the same treatment that would have been afforded a member of the bar."). Without access to the sorts of information plaintiffs in other civil litigation obtain through discovery as a matter of course, incarcerated *pro se* prisoner plaintiffs are hard pressed to identify Doe-captioned defendants by name even after completing the grievance process, filing a complaint, and getting through screening.

CONCLUSION

As Justin Herrera has discussed in the petition, the side of the clean circuit split that the Seventh Circuit adopted below is incorrect as a matter of law, and this Court should grant the petition to resolve it. *Amici* urge the Court to grant the petition not only because of its legal merit, but because of its importance to millions of incarcerated people and their ability to vindicate their civil rights.

Respectfully submitted,

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