Exhibit A

21-1346

United States Court of Appeals

for the

Fourth Circuit

JANE ROE,

Plaintiff/Appellant,

– v. –

UNITED STATES OF AMERICA, *et al.*,

Defendants/Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA AT ASHEVILLE

BRIEF FOR NAMED AND UNNAMED CURRENT AND FORMER EMPLOYEES OF THE FEDERAL JUDICIARY WHO WERE SUBJECT TO OR WITNESSED MISCONDUCT AS *AMICI CURIAE* IN SUPPORT OF APPELLANT JANE ROE

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 21-1346 Caption: Jane Roe v. United States, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Named and Unnamed Current and Former Employees of the Federal Judiciary Who Were Subject to or
(name of party/amicus)

Witnessed Misconduct

who is amici curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: _____ Date: 8/26/2021

Counsel for: Amici - Judiciary Employees, App. A

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INTEREST OF AMICI CURIAE

Amici curiae are current and former employees of the federal judiciary who were subject to or witnessed harassment, discrimination, and retaliation during and after their tenure as judiciary employees.[1] They include current and former federal public defenders, law clerks, and employees of the Administrative Office of the Courts ("AO"). They were subject to and witnessed harassment, bullying, and discrimination—frequently based on sex, race, sexual orientation, and pregnancy status—in courts and defenders' offices across the country. Some amici reported their experiences through formal processes, but many did not feel able to do so without considerable risk. Some amici have faced explicit retaliation for their attempts to address wrongful conduct.

For many amici, the harassment and discrimination they were subject to while working for the judiciary continues to have a tangible impact on their lives and careers, affecting the location and subject

[1] A list of amici curiae is appended to this brief. Pursuant to Fed. R. App. P. 29, amici certify that no party's counsel authored this brief, in whole or in part, and that no person other than amici or their counsel have made any monetary contributions to fund the preparation or submission of this brief. All parties consent to the filing of this brief.

areas in which they work, how they navigate workplaces, and their sense of personal and professional self-worth. These effects—as well as the trauma and cost of sharing these experiences—deterred many potential amici from joining this brief, even anonymously. Of the dozens of current and former judiciary employees who expressed interest, only about a third felt able to share their experiences.

SUMMARY OF ARGUMENT

When it comes to employment law, the federal judiciary is a uniquely insulated institution: responsible for interpreting laws but exempt from many of them, run by judges who dole out justice for a living but are functionally immune from lawsuits.[2] As a result, judiciary employees—unlike most other workers in the United States—lack basic workplace protections, including those guaranteed by Title VII of the Civil Rights Act and the Americans with Disabilities Act.[3] In place of these anti-discrimination statutes is an entrenched reverence for

[2] *See, e.g.*, *Stump v. Sparkman*, 435 U.S. 349, 355-57 (1978).

[3] *Cf.* United States Courts, *Model Employment Dispute Resolution Plan* ("EDR Plan") at 2, https://www.uscourts.gov/sites/default/files/guide-vol12-ch02-appx2a_oji-2019-09-17-post-model-edr-plan.pdf (listing statutory provisions not directly available to judiciary employees).

judicial independence and an inflexible belief that the judiciary "can police [its] own."[4]

Yet the judiciary's self-policing neither protected Jane Roe from being stalked and harassed by her supervisor nor remedied this harassment after the fact. In fact, Jane Roe's experience with the judiciary's inadequate internal disciplinary procedures drove her out of a public defense career to which she had long aspired (and in which she was excelling). She is hardly alone, both in terms of the harassment she faced and how the judiciary's reporting procedures failed her.

In the past few years, a handful of former law clerks have come forward to describe sexual harassment they were subject to while clerking for federal judges.[5] But these publicly shared stories are

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[4] Ann E. Marimow, *Federal judiciary leaders approve new rules to protect court employees from workplace harassment*, Wash. Post (Mar. 12, 2019), https://www.washingtonpost.com/local/legal-issues/federal-judiciary-leaders-approve-new-rules-to-protect-court-employees-from-workplace-harassment/2019/03/12/588a7208-44c3-11e9-8aab-95b8d80a1e4f_story.html.

[5] *See, e.g.*, *Protecting Federal Judiciary Employees from Sexual Harassment, Discrimination, and Other Workplace Misconduct: Hearing Before the Subcomm. on Cts., Intell. Prop., and the Internet* of the H. Comm. on the Judiciary, 116th Cong. (2020) (Testimony of Olivia Warren), https://www.congress.gov/116/meeting/house/110505/witnesses/HHRG-

dwarfed by similar experiences that have not been shared in public. When harassment is perpetrated or sanctioned by a life-tenured judge or judicially appointed Federal Defender, reporting the misconduct may not feel like an option. And even for those brave enough to report their experiences, like Roe, the adjudication of their complaints often leaves them without meaningful recourse, subject to retaliation for exposing that misconduct in the first place.

Amici file this brief to illustrate the nature of harassment and discrimination to which judiciary employees were subjected and the ways in which the judiciary's internal adjudication processes have failed to prevent or remedy such misconduct. We hope the Court takes away from this brief an understanding that Jane Roe's experience was far from isolated. As is true within any institution, employees of the judiciary have faced and will continue to face instances of harassment

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116-JU03-Wstate-WarrenO-20200213-U2.pdf ("Warren Testimony"); Matt Zapotosky, *Prominent Appeals Court Judge Alex Kozinski Accused of Sexual Misconduct*, Wash. Post (Dec. 8, 2017), https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef_story.html.

and discrimination. They deserve a reporting and disciplinary process that is fair, unbiased, and which provides meaningful redress, reflecting best practices that are standard in other fields—including the rest of the legal industry.

ARGUMENT

The federal judiciary employs more than 30,000 people. These employees include judicial staff and administrators, probation and pretrial services officers, and federal public defenders. When these employees face workplace harassment and discrimination, their avenues to report misconduct are limited—in number, in substance, and in outcome.

Section I provides employees' first-hand accounts of harassment and discrimination to highlight the nature of that misconduct. Section II details the general failures of the judiciary's current reporting procedures, which leave employees without real remedy and vulnerable to retaliation. Section III explains how these failures have long-term impacts on amici, the legal profession, and the judiciary.

I. DISCRIMINATION AND HARASSMENT OF ALL KINDS ARE PERPETRATED WITHIN THE JUDICIARY

A. Federal Public Defenders' Offices

Multiple amici were subject to harassment or discrimination while working, like Roe, in federal public defenders' offices. One amicus was encouraged to apply for a job as an assistant federal public defender ("AFPD") by a male attorney in the office.[6] Before she started work, this attorney, whom she understood would be her supervisor, asked her out for drinks. The amicus accepted, "believing that he would be a long-term friend and mentor."[7] He acted inappropriately, eventually attempting to kiss her.[8] When the attorney asked her out again, she declined. After that, the amicus explained: "I felt that [the supervisor] began to treat me differently. At one point, I was so terrified of him when I was alone in his office that I sprinted out. I started feeling extreme anxiety."[9] The amicus received very few assignments, and after only three weeks, the Defender asked her to resign.[10] When she asked

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[6] June 10, 2021 Interview.

[7] May 10, 2021 Testimonial.

[8] *Id.*

[9] *Id.*

[10] *Id.*

why, he told her that she "seemed generally unhappy" and that some of the staff felt uncomfortable because she had asked if her "healthcare covered birth control."[11] She had no choice but to resign on the spot.[12]

Another amicus learned soon after becoming an AFPD that his supervisor was gossiping with coworkers, U.S. Marshals, and even a judge about the fact that the amicus was gay.[13] This supervisor "would come into [the amicus'] office and put his foot up on the chair or otherwise try to assert some sort of dominance," and even "tried to convince [amicus] to go to church with him."[14] The amicus eagerly accepted a position in a different office, only to experience worse treatment.[15] Coworkers told him that his new supervisor and others speculated about his sex life and spread rumors that he slept with his clients.[16] This supervisor also assigned him "all of the transgender

[11] *Id.*

[12] June 10, 2021 Interview.

[13] June 4, 2021 Testimonial.

[14] *Id.*

[15] *Id.*

[16] *Id.*

cases" and "a disproportionate share of the child pornography cases."[17] Although amicus attempted to informally discuss the misconduct with the Defender, amicus was fired shortly thereafter in what he alleges was retaliation for reporting misconduct.[18]

One amicus noted that at least seven of his coworkers openly acknowledged the "rampant racial discrimination" in his FPD office. This discrimination took multiple forms: attorneys of color were bullied regularly, given higher caseloads and more grunt work, deprived of opportunities to work on high profile cases, and consistently denied leave for family-related matters.[19] He noted that the discrimination was subtle; instead of being overt, it was embedded in the office culture. But just as with overt acts of harassment, the amicus found that the ongoing, pervasive discrimination affected his ability to do his job and seek advancement.

Another amicus, who worked in a defender's office with a history of discrimination and harassment, was hopeful when a new Defender

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[17] *Id.*

[18] *Id.*

[19] Aug. 20, 2021 Interview.

was appointed.[20] However, when she learned that he planned to promote certain attorneys with a history of harassing behavior, she raised concerns with him—a decision predicated on his repeated promises that any reports would remain confidential.[21] Soon after, one of the attorneys she had discussed with the Defender aggressively confronted her, yelled at her and threatened to have her fired because she reported his history of engaging in discriminatory harassment.[22] The amicus again reported that attorney's behavior to the Defender, who instructed her to keep quiet and move forward. Over the following years, the Defender—and each member of the management team about whom she had complained—intimidated the amicus, made baseless accusations that she failed to follow rules, pressured her to give a false narrative to an investigator about a separate misconduct complaint filed by a colleague, and demanded she disclose confidential

[20] July 15, 2021 Interview.

[21] *Id.*

[22] *Id.*

conversations with that investigator.[23] This concerted behavior and hostile environment made it impossible for her to do her work.[24]

B. Judicial Clerkships

Other amici were subject to harassment by coworkers while clerking for federal judges. One amicus was persistently harassed by her judge's judicial assistant, who critiqued her clothes, hair, and lack of makeup.[25] "It was so stressful to get dressed in the morning," the amicus recalls.[26] The judicial assistant also made disparaging comments about queer and Jewish individuals—this amicus is bisexual and Jewish.[27] "I felt persistently harassed every day and it made it really hard to show up and try to succeed at my job," she said.[28]

Another amicus was targeted by her judge's permanent clerk after disclosing she was pregnant.[29] Before that point, the judge had been

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[23] *Id.*

[24] *Id.*

[25] July 22, 2021 Interview.

[26] *Id.*

[27] *Id.*

[28] July 22, 2021 Email.

[29] May 20, 2021 Testimonial.

pleased with her work, approved a raise, and asked the amicus to clerk for two more years.[30] After she disclosed her pregnancy, the permanent clerk acted in a hostile manner and privately criticized her work to the judge.[31] When the amicus confronted her, the permanent clerk said "she was angry that [amicus] was pregnant" because "the pregnancy and the baby were going to add to [the permanent clerk's] workload" and interfere with her personal life.[32] The day after the amicus reported this abuse, the judge began looking for a new term clerk to replace amicus. The judge eventually rescinded his offer of an additional two-year clerkship term and terminated amicus' employment during the pandemic, just ten days before her baby was born.

Other amici were sexually harassed by their co-clerks. One amicus reports that, during an appellate clerkship, her male co-clerks "liked to joke about having sex with or raping [her]."[33] They asked about her sexual preferences and simulated anal sex by grabbing her and

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[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] May 6, 2021 Testimonial.

spinning her around.[34] Another amicus described how her male co-clerk, with whom she shared an office, made inappropriate remarks about her body, including trying to guess her bra size.[35] He also asked graphic questions about her sex life and speculated about what sexual acts she and her partner might perform.[36] The co-clerk told female externs to "act more like Monica Lewinsky," and later announced proudly that he had gotten "handsy" with one of those externs.[37] The amicus was so afraid of being left alone with the co-clerk that she began leaving work early and skipping social events (which can be important for professional advancement).[38]

Then, of course, there are the amici who were subject to misconduct by judges. For some amici, this harassment was sexual. In 2020, amicus Olivia Warren testified before Congress about her clerkship with the late Judge Stephen Reinhardt. Warren described the judge's constant denigration of her appearance, demeaning speculation

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[34] *Id.*

[35] June 28, 2021 Interview.

[36] *Id.*

[37] *Id.*

[38] *Id.*

about her sex life, and combative comments about feminism and the #MeToo movement.[39] Multiple women have also come forward with allegations of sexual harassment by former Judge Alex Kozinski. Amicus Heidi Bond described her experience of being summoned to Kozinski's office so that he could show her pornography and ask if it aroused her.[40] She described how his conduct during her clerkship was "beyond inappropriate."[41] She explained: "I wished that he had never told me that he controlled when I slept, when I ate, that I had never been given reason to worry about whether my bodily autonomy was at stake in other ways, too."[42] Other amici witnessed Kozinski make "sexist comments and jokes on a regular basis,"[43] and were the recipients of some of these comments.[44] Kozinski's misconduct was an "open secret"—to his clerks, his peers, and even circuit executives.[45]

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[39] Warren Testimony at 7-8.

[40] Heidi Bond, Kozinski, *Courtney Milan*, https://www.courtneymilan.com/metoo/kozinski.html.

[41] *Id.*

[42] *Id.*

[43] April 27, 2021 Testimonial

[44] May 3, 2021 Testimonial.

[45] Dahlia Lithwick, *He Made Us All Victims and Accomplices,* Slate

Another amicus accepted a clerkship with a preeminent appellate judge after her first year of law school.[46] Before she started, she was approached by at least three former clerks to warn her that the judge might treat her differently because of her appearance.[47] To combat her increasing anxiety, she purchased new clothes to obscure her figure and developed an "emergency plan" in case the harassment became unbearable.[48] Throughout her clerkship, she kept a running log of comments the judge made about her appearance: his remarks on her legs and hair and instructions on what to wear.[49] She ultimately decided that the benefits of the clerkship outweighed the costs, but she found the experience to be "a disruption: frustrating, annoying, and exhausting."[50]

The abusive behavior to which amici were subjected would never be tolerated in most workplaces. One amicus, who is queer, learned

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(Dec. 13, 2017) https://slate.com/news-and-politics/2017/12/judge-alex-kozinski-made-us-all-victims-and-accomplices.html.

[46] July 29, 2021 Interview.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

that—before she started her appellate clerkship—her judge repeatedly referred to her by using a slur for her sexual orientation.[51] Another clerk told the judge that was inappropriate, and the amicus believes the judge felt policed and treated amicus with suspicion and hostility, while repeatedly attempting to ascertain details of her sexual history.[52] The judge also constantly yelled at and belittled amicus, questioning her intellect.[53] At one point, the amicus had a major confrontation with her judge about these comments.[54] The amicus lost job opportunities in retaliation for her "disloyalty."[55] The amicus moved and began practicing in a different location to avoid further retaliation.

A different amicus was bullied by his judge.[56] The judge subjected him "to verbal hostility and mind games, including characterizing [his] work as garbage, assigning the other clerks to supervise [his] work, and

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[51] May 10, 2021 Interview.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] May 21, 2021 Testimonial.

consistent double standards."[57] The amicus now practices in an area of the law where he will not encounter his judge.[58]

Judges and supervisors within the judiciary have also engaged in discriminatory treatment in the context of hiring. One amicus interviewed with a high-profile appellate judge, but the interview felt off from the beginning.[59] The judge exhibited no interest in her legal achievements and instead fixated on her husband.[60] When she mentioned that she and her husband would have a long-distance relationship if she were to clerk for the judge, the judge "grimaced" and said, "Well, in my experience, a good clerk is a happy clerk, and I don't think you'll be happy in that situation."[61] The amicus realized she was not getting the job—despite limited discussion of her qualifications—and left the interview feeling deflated and confused.[62] Another amicus, who was engaged at the time, was asked to confirm in an interview that

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[57] *Id.*

[58] *Id.*

[59] June 25, 2021 Testimonial.

[60] *Id.*

[61] *Id.*

[62] *Id.*

she would not become pregnant during the clerkship.[63] Multiple former clerks noted that their judges made discriminatory remarks about clerkship candidates based on race, gender, and sexual orientation.

Although this section provides first-hand accounts of harassment, bullying, and discrimination, many potential amici chose not to include their accounts (even anonymously) for fear of retaliation. Nevertheless, the experiences highlighted above illustrate that misconduct is not an isolated problem within the federal judiciary.

II. THE JUDICIARY'S CURRENT REPORTING PROCEDURES ARE FUNDAMENTALLY FLAWED

Although there are multiple avenues to report misconduct, judiciary employees tend to go through either the Fair Employment Practices System (FEPS) complaint process, available to AO employees, or the Employment Dispute Resolution (EDR) Plan, available to all other judiciary employees.[64]

[63] June 28, 2021 Interview.

[64] Although there are other reporting mechanisms, they fall outside the scope of this brief. For example, the Judicial Conduct and Disability Act applies only to federal judges.

Following the allegations against Kozinski, Chief Justice Roberts established the Federal Judiciary Workplace Conduct Working Group ("Working Group") to examine workplace misconduct in the judiciary.[65] The Working Group revised the model EDR Plan, which the Judicial Conference approved in 2019 for adoption by each court.[66] The EDR Plan provides three reporting options: employees (1) may seek informal advice about their rights and reporting options from an EDR Coordinator, the Circuit Director of Workplace Relations, or the national Office of Judicial Integrity; (2) can request Assisted Resolution, which may include preliminary investigation and mediation; and (3) can file a Formal Complaint.[67] Once a Formal Complaint is filed, the Presiding Judicial Officer (PJO) determines the nature—if any—of

[65] United States Courts, *Fact Sheet for Workplace Conduct in the Federal Judiciary*, https://www.uscourts.gov/about-federal-courts/workplace-conduct/fact-sheet-workplace-conduct-federal-judiciary.

[66] *Id.* Courts do not have to adopt the Model EDR Plan. *See* EDR Plan at 12. Because plans vary, this brief refers to the Model EDR Plan to discuss specific provisions. Although some amici were subject to misconduct prior to the 2019 revision, the scope of that revision does not obviate the issues and challenges described herein.

[67] EDR Plan at 5-7.

discovery, written submissions, and hearings.[68] The PJO then issues a written decision, ordering dismissal or implementing remedies.[69] An employee may appeal that decision to the judicial council of the circuit, although the PJO's decision will be affirmed "if supported by substantial evidence and the proper application of legal principles."[70]

The AO's FEPS complaint process requires employees to first complete informal counseling, after which they may file a Formal Complaint. If the FEP officer accepts the complaint, an investigation is conducted and a report prepared. The complainant may then request a hearing, but ultimately the FEP officer issues a final decision, which can be appealed to an Article III judge in certain instances.

Although the plans are different, they share four significant flaws:

(1) opaque processes;

(2) lack of meaningful confidentiality, which heightens the risk of retaliation;

(3) no indicia of impartiality; and

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[68] *Id.* at 6-10.

[69] *Id.* at 9-11.

[70] *Id.* at 11.

(4) limited remedies.

Each flaw disincentivizes reporting, entrenches misconduct, and leaves judiciary employees without basic employment protections or due process. As demonstrated below, Roe and the amici confronted these flaws throughout their employment. Some amici discovered the flaws upon reporting; others decided not to report at all.

A. The reporting processes and procedures are opaque.

A lack of clear procedures prevents judiciary employees from obtaining full and fair investigation and adjudication of complaints regarding misconduct. Employees reporting misconduct frequently lack significant information about the scope and breadth of an investigation.

For example, no district is required to adopt the model EDR Plan. And because that Plan is not administered by a central entity, the process due to any complainant varies significantly. Some districts allow full-fledged discovery; others limit investigation to those interviews the district's investigator chooses to conduct. Even when a particular district permits discovery, the procedures may not be outlined anywhere. This prevents complainants from demanding

discovery to which they may be entitled.[71] In some districts, the complainant may also never review a final report.

Multiple amici who reported misconduct noted that, if their claims were investigated, any investigation was cursory at best. One amicus expressed incredulity that she was not interviewed about her own experience prior to the conclusion that her claims lacked merit.[72] Another amicus stated that the investigator did not interview any of the individuals on the amici's witness list. A third amicus reported a pattern of abusive behavior by a member of chambers' staff; the investigator failed to investigate any evidence of a pattern or practice.

The amici also felt they lacked guidance and communication. One amicus described submitting his complaint, only to hear nothing for months; eventually, he learned there was confusion over whether the district or appellate court would have jurisdiction.[73] Another amicus was frustrated that she was not allowed to conduct discovery or cross-

[71] EDR Plan at 9 ("The Federal Rules of Evidence and any federal procedural rules do not apply.").

[72] June 10, 2021 Interview.

[73] June 4, 2021 Testimonial.

examination before the ruling against her.[74] The PJO never provided guidance on discovery,[75] and interviewed witnesses on his own, including the judge who allegedly retaliated against the amicus. The transcript of that interview revealed that the PJO "steer[ed]" the accused judge's answers and "ask[ed] leading questions."[76] The amicus and her counsel had no opportunity to object or cross-examine the judge.[77] The interview ended with the witness-judge asking the PJO to grab lunch.[78]

The above-described obstacles—which mirror Roe's experience—seem to be a feature of the system rather than a bug. For example, Roe met with the national Judicial Integrity Officer (JIO) to discuss these difficulties. The JIO allegedly told Roe that every court handles these processes differently, which means the judiciary's decentralized approach is inherently "barebones" and has "no rules."[79] The JIO

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[74] June 29, 2021 Email.

[75] *Id.*

[76] July 19, 2020 Email.

[77] *Id.*

[78] *Id.*

[79] *Id.* ¶ 430.

encouraged Roe to pursue motions and discovery, despite the lack of any formal guidance.[80] In effect, Roe—like many amici—began learning the rules of the proceeding while in the middle of it, but she had no way to confirm the accuracy of those rules or their application in practice.

B. The lack of meaningful confidentiality in reporting heightens the risk of retaliation.

Confusion regarding confidentiality contributes to the ever-present fear of retaliation. The judiciary wields confidentiality as both a sword and a shield. In multiple instances, employees have been unable to keep the contents of their complaints confidential. Without clear delineation of what information will be kept confidential, employees face the almost-certain knowledge that their colleagues—and potential witnesses—will learn about the specifics of their complaint. But the judiciary also uses confidentiality to limit employee knowledge, by citing confidentiality concerns to preclude complainants from reviewing investigation reports or confronting witnesses. Employees are thus deterred from reporting because of the inevitable disclosure of their

[80] *Id.* ¶ 432.

complaints, all while the judiciary strictly controls what—if any—information is available to that employee.

The fear of retaliation is quite possibly the largest barrier to reporting harassment or discrimination within the judiciary. Although the plans define misconduct to include retaliation, that alone cannot dampen the threat of retaliation or its far-reaching consequences. On a professional level, judiciary employees face losing recommendations and tarnishing their reputations if they report misconduct. Because many supervisors in the judiciary are the only managers of their silos, they become the sole reference for those employees when seeking future employment. These fears are particularly acute in small or isolated districts or where an employee does not have many other references—i.e., a recently graduated law clerk. And on a personal level, retaliation—or even the possibility of it—can make it difficult to complete the day-to-day tasks of a job.

The current procedures also do not explain how the judiciary determines whether a complainant has been subject to retaliation and what the appropriate remedy is. The only option seems to be filing

another EDR complaint, a circular solution that does not instill confidence in the workability of the system.

Facing the potential professional and personal repercussions, many amici did not feel reporting was a realistic option without meaningful confidentiality. Amicus Olivia Warren testified that even the new reporting policies—following recommendations from the Working Group in 2019—"did not appear to provide a truly confidential option to report harassment or misconduct."[81] Given the "lack of meaningful guidance on what confidentiality would apply" to her complaint—even from the JIO, she decided not to report within the judiciary. She concluded that publicly testifying before Congress would be far more likely to protect her against retaliation. As one amicus who was bullied by his judge explained, "If that happened to me in my current professional setting, I would absolutely report."[82] But, like Ms. Warren, he was not aware of any truly confidential internal reporting

[81] Warren Testimony at 15.

[82] May 27, 2021 Interview.

mechanisms, and the professional consequences of leaving his clerkship early felt too great.[83]

Another clerk decided not to report because she had already suffered retaliation after confronting her judge.[84] She described how chambers staff contacted potential employers and, in at least one instance, succeeded in having amicus' offer of employment revoked.[85] Although at least one other judge was aware of the retaliation she was subject to, he did not seek further information. This interaction cemented her belief that reporting would be ineffective. As for one amicus who was sexually harassed by her co-clerks, she didn't know to whom she could effectively report without retaliation.[86] Her harassment was "not a secret"—other clerks in her courthouse and at least one judge knew about the harassment and did nothing to stop it. Approaching her judge was not an option.[87] "There was a serious

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[83] *Id.*

[84] May 10, 2021 Interview.

[85] *Id.*

[86] July 28, 2021 Interview.

[87] *Id.*

possibility he would just do nothing, and that people would know I had tried to talk to him about it."[88]

Multiple law-clerk amici acknowledged that they chose not to report for fear of retribution from former law clerks. Olivia Warren's congressional testimony explained why:

> Judges have networks of former law clerks to whom the judge's reputation is inextricably intertwined with their own. This group therefore has reasons both devoted and selfish to want to protect the judge's reputation at all costs. . . . [T]he possibility of immediate retaliation by the judge is supplemented by the possibility of long-term retaliation by those devoted to protecting his reputation and remaining in his good graces.[89]

As another amicus explained, the reporting systems were "beside the point," because potential retribution ensured that the "incentives were so warped" against reporting.[90] She noted that former clerks with a

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[88] *Id.*

[89] Warren Testimony at 12-13; *see also* Olivia Warren, *Enough is Not Enough: Reflection on Sexual Harassment in the Federal Judiciary*, 134 Harv. L. Rev. F. 446, 451 n.18 and n.19 (Jun. 20, 2021), https://harvardlawreview.org/2021/06/enough-is-not-enough-reflection-on-sexual-harassment-in-the-federal-judiciary/ (detailing public and private fallout after testimony).

[90] July 29, 2021 Interview; *see also* Leah M. Litman and Deeva Shah, On Sexual Harassment in the Judiciary, 115 Nw. U. L. Rev. 599 (2020), https://scholarlycommons.law.northwestern.edu/nulr/vol115/iss2/5 (describing myriad ways in which the clerkship system and professional

vested interest in protecting their judge's reputation would undoubtedly impact her ability to find a job.[91]

For those amici who filed an EDR report, these concerns affected their ability to engage in the process. One amicus explained how uninvolved colleagues were somehow aware of the details of her complaint despite the promise of confidentiality.[92] Another AFPD was "severely shamed and ridiculed" by colleagues in her small office when she did file a complaint.[93]

The fear of retaliation does not just affect whether employees report; it deters people from challenging these EDR or FEPS processes or serving as counsel for complainants. Amicus Heidi Bond, who publicly disclosed the harassment she was subject to during her clerkship, expressed immense frustration that the Working Group report attempted to blame any confusion about confidentiality on law clerks. She described how the Working Group reached this "damaging"

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norms disincentivize reporting and replicate hierarchies).

[91] *Id.*

[92] July 15, 2021 Interview.

[93] June 10, 2021 Interview.

conclusion without talking to her even once—notwithstanding her public comments—thus "minimizing the actual gaslighting that happened to [her]."[94]

Amici have been subject to retaliation for speaking publicly about these issues.[95] Moreover, these amici receive requests each month from current judiciary employees seeking EDR counsel. But amici have found that fear of retaliation also deters volunteers; many lawyers who practice in federal courts refuse to take on (mostly pro bono) cases that involve the judges, staff, and federal defenders they interact with on a regular basis.

C. The reporting procedures do not ensure impartiality.

The judiciary's current processes entrench—instead of assuage—concerns about impartiality and fairness. Unlike the strict division

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[94] May 11, 2021 Testimonial.

[95] *See, e.g.,* Letter submitted for the record from Jaime Santos, https://docs.house.gov/meetings/JU/JU03/20200213/110505/HHRG-116-JU03-20200213-SD001.pdf (describing a federal judge's retaliatory public comments about law clerks' advocacy efforts and how there was "no upside to filing a complaint about an incident that the judiciary already knew about. Doing so could have adversely impacted [her] effectiveness as an advocate and [her] ability to generate business.").

among investigation, prosecution, and adjudication that governs cases filed in court, the federal judiciary's reporting procedures do not explicitly differentiate among these steps. This elision of roles creates a high risk of incomplete investigations and unfair judgments.

The investigators and decision-makers within the judiciary are frequently supervisors and are likely to know—or have recommended, hired, or become friends with—people accused of misconduct. Even when the investigator does not directly know the subject of investigation, this proximity—usually within the same district—creates situations where protecting personal relationships can outweigh fairness and impartiality. This concern is illustrated by the experiences of many amici outlined *supra*. Moreover, many judges are loath to criticize how another judge runs her chambers, which can impact the quality of an investigation and limit the relief available to a complainant. This self-policing system lacks both the substance and veneer of impartiality.[96]

[96] Although the EDR Plan recognizes the importance of impartiality, it fails to explain how the Plan guarantees impartiality. *See* EDR Plan at 4.

Amicus Olivia Warren expressed concerns about reporting within the Ninth Circuit because "it was very clear how beloved Judge Reinhardt was and [she] could not trust that they would receive the information confidentially or with an open mind."[97] Another amicus explained that the small federal bench in her district meant her complaint would—and did—inevitably end up before her judge's friends.[98] And like Roe, multiple amici noted similar concerns about filing complaints against their local Defender, who (1) had been appointed by the judges who would adjudicate the complaint, and (2) were friends with many of the investigators and coordinators. These biases also found their way into the investigative process; one amicus recounted an investigator's description of a decade-long relationship

[97] Warren Testimony at 15; *see also* Cathy A. Catterson, Opinion, *Letters to the Editor: In Defense of the Late 9th Circuit "Liberal Lion" Judge Stephen Reinhardt*, L.A. Times (Feb. 26, 2020, 3:00 AM), https://www.latimes.com/opinion/story/2020-02-26/9th-circuit-liberal-lion-judge-stephen-reinhardt (public letter from former Ninth Circuit executive chastising Olivia Warren for her testimony; the Ninth Circuit has never addressed the letter).

[98] May 20, 2021 Testimonial.

with the "good people" the amicus had accused of discrimination and how those people "didn't mean to" engage in misconduct.[99]

Another amicus grew increasingly frustrated about racial disparities in his office after over 20 years as an AFPD.[100] He considered the EDR process but decided that it would be—at best—pointless. He understood that any complaint against the Defender would be decided by federal judges in that circuit. Because the Defender was "very chummy" with the judges who had appointed him, the amicus felt that his concerns would not receive a fair evaluation and that he would likely face further discrimination and harassment for filing a complaint.[101] So, after two decades in a job he loved, he quit.[102]

D. Remedies are severely limited.

Finally, the judiciary's current reporting procedures leave victims without adequate redress. The EDR Plan is severely limited in what actions can be taken against a judge, as removal is not possible.

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[99] June 10, 2021 Interview.

[100] July 24, 2021 Interview.

[101] *Id.*

[102] *Id.*

Adjudicators generally lack any enforcement ability within chambers, FPD's offices, or in probation and pretrial services.[103] Thus, any complaint may be futile from the start, as the available remedies are incomplete, ineffective, or unenforceable.[104]

Roe's case exemplifies the futility of reporting procedures without remedies. Months after Roe filed her complaint, the JIO allegedly told Roe that Article III judges lacked the authority to order a federal defender's office to comply with any settlement terms.[105] The circuit mediator recognized the futility of the EDR process, explaining that many settlements "were vetoed by the AO because the judiciary lacked statutory authority to implement those remedies."[106] These limitations were not outlined in the EDR Plan.

Similarly, an amicus filed an EDR complaint in which her allegations were substantiated. That victory was hollow. The sole

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[103] EDR Plan at 11 n.3 ("The [PJO] lacks authority to impose disciplinary or similar action against an individual.").

[104] Ironically, although AFPDs don't have access to statutory protections (i.e., Title VII and the ADA) as employees of the judiciary, their counterparts—AUSAs—do as employees of the Department of Justice.

[105] Compl. ¶ 439.

[106] *Id.* ¶ 416.

recommendation was that the judicial assistant who engaged in misconduct watch a training video; no one ever followed up on whether that occurred.[107] The judicial assistant faced no other consequences and refused to speak to the amicus for the rest of the year.[108] The amicus expressed frustration at the "toxic" lack of oversight in the judiciary, despite ongoing retaliation after her complaint.[109]

Other amici noted how the judiciary's remedies stifle complainants. For example, the judiciary's proposed settlements following investigations force complainants into further silence. Many amici did not realize that EDR settlements typically require a non-disclosure agreement, regardless of whether an investigation substantiated the complaint. For those amici, the NDA requirement confirmed their suspicions that the judiciary's focus was to limit public blowback—not to ensure effective redress.

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[107] April 27, 2021 Interview.

[108] *Id.*

[109] *Id.*

III. THESE FLAWED REPORTING PROCEDURES HAVE A LONG-TERM IMPACT ON EMPLOYEES' LIVES

Amici have felt the repercussions of this misconduct far beyond their employment with the judiciary. On a personal level, multiple amici described the compounding anxiety of coping with harassment and discrimination while also deciding whether and how to report. They described bouts with depression, anxiety, and PTSD during and after their employment. As one amicus explained, "I felt so invalidated during the EDR process . . . and went to therapy for over a year to cope."[110] A former law clerk described her experience as "traumatic," a "year" of "feeling emotionally unsafe at work."[111] She described daydreaming about getting into a car accident so she could avoid going into chambers.[112] A former AFPD disclosed that her colleagues' "ridicule and attacks" after she reported made her consider ending her life.[113]

Many of the amici who reported misconduct emphasized that they would not report misconduct in the future. Many amici left their dream

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[110] May 10, 2021 Testimonial.

[111] July 22, 2021 Interview.

[112] *Id.*

[113] May 10, 2021 Testimonial.

jobs or the legal profession entirely because of this misconduct. One amicus, who had a passion for criminal defense work, now works in-house in a non-litigation role to avoid interactions with her harasser in her small legal community.[114] Others physically moved to locations where retaliation was less likely.

Unsurprisingly, these repercussions disproportionately impact underrepresented populations in our profession—i.e., women, people of color, and other minority groups. One amicus, a woman of color, began her clerkship right after law school; the judge "regularly verbally abused, insulted, and yelled at" her.[115] This amicus lost her confidence and "was convinced that [she] could not be successful, either as a clerk or in the legal profession."[116] By the time she realized her situation was not normal, "reporting felt extremely scary—made worse by [her] sense that there were no clear policies, safeguards, or mechanisms for fairness in place."[117] Another amicus, who saw several colleagues make failed

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[114] *Id.*

[115] Aug. 16, 2021 Testimonial.

[116] *Id.*

[117] *Id.*

attempts to file EDR complaints, explained that the judiciary's processes exhibit a pattern of disregard for complaints.[118] Another amicus dejectedly concluded that the "whole EDR process is a sham and a complete injustice."[119]

This disillusionment with the judiciary and the profession is particularly unfortunate.[120] As amicus Olivia Warren testified, "[A]ttempting to navigate how to report that misconduct indelibly colored my view of the judiciary and its ability to comprehend and adjudicate harm."[121]

Multiple amici echoed that the judiciary is simply unable to police itself. Those amici include Laura Minor, the former Equal Employment Opportunity Officer for the AO and the former Secretary of the Judicial Conference, both positions providing insight into misconduct

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[118] July 15, 2021 Interview.

[119] July 19, 2021 Email.

[120] As one amicus noted, "federal judges are among those best-positioned . . . in terms of acting against discrimination and harassment." June 3, 2021 Interview. But "like many workplaces, when there is a problem, those in power can have an effect on whether justice prevails." *Id.*

[121] Warren Testimony at 17.

proceedings.[122] Ms. Minor noted that even as an executive in the AO, she was subject to discrimination as a Black woman; however, the FEPS plan—which she administered—exempted her from filing a complaint.[123] She summarized her significant experience overseeing workplace-misconduct complaints:

> I watched for over 20 years and what I saw, every step of the way, was the judiciary circling the wagons any time there was a complaint made by an employee. It was impossible for an employee to break through that. Even if the judiciary says they can monitor themselves, the culture prohibits that. A lot of judges are really good people, but there's something about being a member of the club. When somebody violates the rules, instead of holding them accountable, the judiciary makes sure nobody comes in and tells them what to do.[124]

She emphasized that despite over two decades of working groups, she has yet to see ***any*** meaningful change in how the judiciary handles complaints.[125] The flaws she described had a common thread: the

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[122] March 24, 2021 Interview.

[123] *Id.*

[124] *Id.*

[125] *Id.*

judiciary's insistence on policing itself without oversight or accountability.

Amici recognize the irony of the fact that the judiciary insists it can police itself, yet it does not have enough faith in its self-policing to allow Roe to bring her complaint in federal court. In dismissing Roe's complaint, the district court confirmed that Roe—and others—could not access the same procedures and remedies the federal judiciary uses to resolve thousands of employment cases every year. Thus, amici respectfully submit this brief in support of Petitioner Jane Roe, because they know firsthand the repercussions of enduring and reporting misconduct as employees of the federal judiciary. Amici hope that current and future employees of the judiciary can access the same rights and protections afforded to their peers and supposedly guaranteed by the Constitution.

IV. CONCLUSION

For the foregoing reasons and those stated in Jane Roe's brief, the decision of the district court should be reversed.

Dated: August 26, 2021

Respectfully submitted,

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CERTIFICATE OF RULE 32 COMPLIANCE

I certify the following in accordance with Fed. R. App. 32(g)(1):

1. This brief complies with the type-volume limits because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) (i.e., cover page, disclosure statement, table of contents, table of authorities, certificate of counsel, signature blocks, proof of service, addendum), this brief contains 6,499 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Federal R. App. 32(a)(6), because it was prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point font size and Century Schoolbook type style.

Dated: August 26, 2021

/s/ Erin E. Meyer
ERIN E. MEYER
ATTORNEY FOR AMICI CURIAE

CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Erin E. Meyer
ERIN E. MEYER
ATTORNEY FOR AMICI CURIAE

APPENDIX A

LIST OF AMICI CURIAE

Olivia Warren

Former Law Clerk

Heidi Bond

Former Law Clerk

Laura Minor

Former Associate Director for the Department of Program Services for the Administrative Office of the Courts (AO), Former Equal Employment Opportunity Officer for the AO, Former Secretary to the Judicial Conference of the United States

Leah Litman

Assistant Professor of Law, University of Michigan Law School
Former Law Clerk

Joanna L. Grossman

Ellen K. Solender Endowed Chair in Women and the Law, SMU Dedman School of Law
Former Law Clerk

Caitlin Halpern

Former Law Clerk

Leah Judge

Former Law Clerk

Jaime A. Santos

Former Law Clerk

Deeva Shah

Former Law Clerk

Maile Yeats-Rowe

Former Law Clerk

Anonymous

Former Employee, Administrative Office of the Courts

Anonymous

Former Federal Public Defender Administrator

Anonymous

Assistant Federal Public Defender

Anonymous

Former Assistant Federal Public Defender

Anonymous

Former Assistant Federal Public Defender

Anonymous

Former Assistant Federal Public Defender

Anonymous

Deputy Federal Public Defender, Former Law Clerk

Anonymous

Former Law Clerk, U.S. Court of Appeal

Anonymous

Former Law Clerk, U.S. Court of Appeal

Anonymous

Former Law Clerk, U.S. Court of Appeal

Anonymous

Former Law Clerk, U.S. District Court

Anonymous

Former Law Clerk, U.S. District Court

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Former Law Clerk,
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