

No. 73815-1-I

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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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KING COUNTY, ET AL.,

*Respondents,*

v.

DONNA ZINK,

*Appellant.*

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**BRIEF OF RESPONDENTS JOHN DOE A, JOHN DOE B AND  
JOHN DOE J**

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## INTRODUCTION AND SUMMARY

Respondents John Doe A, John Doe B and John Doe J (Plaintiffs) represent a class of low risk sex offenders who seek to prevent Respondent King County from disclosing their private health and medical information in response to a Public Records Act (PRA) request. The records at issue are evaluations performed by health care professionals under the Special Sex Offender Sentencing Alternative (SSOSA) law, RCW 9.94A.670. SSOSA evaluations determine whether certain first-time sex offenders are amenable to treatment, and thus whether they may receive a SSOSA—a suspended sentence with intensive clinical treatment and supervision. *See* RCW 9.94A.670(2)–(6). To complete the evaluation, the health care professional must examine the patient’s psychosexual history and condition, and assess the offender’s relative risk factors and amenability to treatment. RCW 9.94A.670(3)(a)–(b); WAC 246-930-230(2)(d)–(f). If the offender is deemed amenable to treatment, the professional must also include a detailed treatment plan. RCW 9.94A.670(3)(b); WAC 246-930-230(2)(g).

Requester and Appellant Donna Zink, invoking the PRA, asked King County to release all SSOSA evaluations in its possession. The trial court correctly enjoined King County from this blanket release. The PRA recognizes the public’s interest in government transparency, RCW

42.56.030, and also recognizes that this interest has limits, *see, e.g.*, RCW 42.56.070(1); RCW 42.56.360. This case is about one of those limits.

SSOSA evaluations are exempt from disclosure under chapter 70.02 RCW, the Uniform Health Care Information Act (UHCIA), because they are identifiable patients' health care information. *See* RCW 42.56.360(2) ("health care information of patients" under chapter 70.02 RCW is exempt from disclosure under PRA). Only licensed health care professionals can perform SSOSA evaluations, and those professionals treat SSOSA evaluations the same way they would treat any other evaluation of a patient seeking mental health treatment for a sexual behavior problem. Health care professionals who clinically evaluate their patients must conduct a comprehensive psychological assessment and propose a detailed health care treatment plan. If SSOSA evaluations are not protected under chapter 70.02 RCW, it is difficult to imagine what medical information could be exempt from the PRA.<sup>1</sup>

The trial court was also right to enjoin the release of SSOSA evaluations under RCW 42.56.540, the provision of the PRA authorizing

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<sup>1</sup> The SSOSA evaluations are also exempt from disclosure under RCW 70.02.250 and RCW 71.05.445 because they are documents that must be maintained confidential by the Washington Department of Corrections. Those specific exemptions are not before the Court in this case, but are at issue in another pending case involving Ms. Zink's PRA requests. *See John Doe G et al. v. Dep't of Corrections*, Case No. 74354-6-I (Div. 1).

injunctions against disclosure. The court was presented with detailed, un rebutted evidence showing that blanket disclosure of SSOSA evaluations would retraumatize victims, hinder offenders from rehabilitation and reintegration, and undermine the success of the SSOSA system itself. The trial court found this evidence credible. In the light of this evidence, the injunction should be affirmed.

Ms. Zink raises a number of other arguments: whether the trial court should have allowed Plaintiffs to proceed pseudonymously, whether the trial court should have certified a Plaintiff class, and whether the trial court should have entered a preliminary injunction. These arguments are legally flawed and should be rejected.

#### **STATEMENT OF THE ISSUES**

1. Does chapter 70.02 RCW exempt SSOSA evaluations from disclosure under the Public Records Act?
2. Did the trial court correctly find that SSOSA evaluations contain sensitive personal and medical information, and that their blanket disclosure would not be in the public interest and would substantially injure either a vital government function or Plaintiffs themselves?
3. Did the trial court abuse its discretion in allowing Plaintiffs to proceed in pseudonym?
4. Did the trial court abuse its discretion in certifying a class of Plaintiffs?

## STATEMENT OF THE CASE

### I. The SSOSA system

In enacting the SSOSA system, the Legislature “create[d] a sentencing alternative for certain first time sex offenders.” *State v. Pannell*, 173 Wn.2d 222, 227, 267 P.3d 349 (2011). Under this system, eligible offenders who are found amenable to treatment must submit to intensive treatment and supervision. RCW 9.94A.670(5)(b)–(d). In exchange, the sentencing court may suspend a portion of the offenders’ prison time. RCW 9.94A.670(5)(a).

The SSOSA statute lays out exacting standards for SSOSA eligibility, drastically narrowing the number of offenders who are eligible for SSOSAs. RCW 9.94A.670(2), (4). Even among eligible offenders, however, SSOSA sentences are uncommon. In 2005, for example, only 35% of sex offenders who met the threshold eligibility criteria actually received a SSOSA. CP 1407, ¶ 15.c. And in fiscal year 2012, only 95 offenders in all of Washington received a SSOSA. CP 1408, ¶ 15.e.

Despite—or perhaps because of—their relatively rarity, SSOSA sentences have proven remarkably effective. Sex offenders who complete SSOSA sentences have the lowest recidivism rates for any type of crime, including sex offenses. CP 1419, ¶ 7; *see also* CP 1408, ¶ 16 (“[R]ecidivism rates for individuals who complete the SSOSA program

remain consistently lower than recidivism rates for individuals who do not receive SSOSA[.]”); *id.* at ¶ 17 (“lowest risk of reoffense of any other felony offense, sexual or nonsexual”)

Beyond the threshold eligibility requirements, the SSOSA system requires that offenders, to receive a SSOSA, undergo an evaluation and be found amenable to treatment. CP 1405, ¶ 8. To determine amenability, the trial court orders a detailed SSOSA evaluation. RCW 9.94A.670(3). These evaluations must be performed by certified treatment providers—health care professionals who have been specifically licensed by the Department of Health to evaluate and treat sex offenders. *See* RCW 9.94A.820(1); RCW 18.155.020.

The SSOSA evaluation’s purpose is to assess “the offender’s amenability to treatment and relative risk to the community,” and to propose a “treatment plan.” RCW 9.94A.670(3)(b). To fulfill this purpose, SSOSA evaluations must contain detailed personal information. They must describe, among other things, the offender’s crime; sexual history; perceptions of others; risk factors, including the offender’s alcohol and drug abuse, sexual patterns, use of pornography, and social environmental influences; personal history, including the offender’s relationships, employment, and education; a family history; a history of the offender’s violence or criminal behavior; and the offender’s mental health

functioning. WAC 246-930-320(2)(e). They include psychosexual evaluations that identify past sexual partners, any past victims, and details of their sexual activities. CP 1406, ¶11. The SSOSA evaluations include personal details like medications taken, medical history, spousal relationships and sexual preferences. CP 1406, ¶ 12; CP 1480, ¶ 4; CP 1484, ¶ 3. Based on these factors, the SSOSA evaluation must assess the appropriateness of community treatment, summarize the examiner's diagnostic impressions, gauge the offender's risk of reoffending, appraise the offender's willingness for outpatient treatment, and propose a clear and detailed treatment plan. WAC 246-930-320(2)(f), (g); *see also* CP 1433 ¶ 13 (“An in depth psychological evaluation is important for individuals with more than a low risk to reoffend as [it] ... is the basis for the identification of the individual's specific risk-relevant propensities.”)

After receiving the evaluation, the trial court must decide whether to impose a SSOSA. *See* RCW 9.94A.670(4). If the court decides to impose a SSOSA, the sentence must include certain terms. The sentence, for example, must always include a period of treatment of up to five years. RCW 9.94A.670(5)(c). *See, e.g.*, CP 1484, ¶ 4. It must also impose “[s]pecific prohibitions and affirmative conditions” relating to behaviors that may trigger recidivism, such as viewing pornography or using intoxicants. RCW 9.94A.670(5)(d).

**II. Plaintiffs filed this action to enjoin release of SSOSA evaluations after Ms. Zink demanded evaluations from King County under the Public Records Act (PRA).**

In 2014, Donna Zink sent a PRA request to the King County Prosecuting Attorney's Office. She demanded all SSOSA evaluations in King County's possession.<sup>2</sup> CP 1060-61 ("in any and all departments"). Not long thereafter, Plaintiffs filed this action to enjoin the mass release of SSOSA evaluations. CP 1-17

Plaintiffs John Doe B and John Doe J are current or former Level I sex offenders who underwent SSOSA evaluations. CP 1479-80, ¶¶ 2-3; CP 1484, ¶¶ 3-4. Washington differentiates between offenders who present a high, moderate or low risk for re-offense. CP 1428-30, ¶¶ 6-8; *see also State v. Brosius*, 154 Wn. App. 714, 720, 225 P.3d 1049 (2010). Level I offenders are those registered sex offenders who have been assessed to pose the lowest risk to the public. RCW 13.40.217(3), 72.09.345(6); CP 1421-22, ¶¶ 15-19. Level I offenders are statistically at low risk of committing new crimes. CP 1422, ¶ 19; *see also* RCW 72.09.345(6) ("The committee shall classify as risk level I those sex offenders whose risk assessments indicate a low risk of re[-]offense within the community at large.").

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<sup>2</sup> Ms. Zink also requested sex offender registration records but the issue of whether those records should be disclosed was decided in the Washington Supreme Court's decision in *Doe ex rel. Roe v. Wash. State Patrol*, 185 Wash.2d 363, 374 P.3d 63 (2016).

After filing this action, Plaintiffs sought a temporary restraining order, and then a preliminary injunction, both of which were granted. CP 22-25; CP 143-49. The trial court also allowed Plaintiffs to proceed in pseudonym and to represent a certified class of compliant Level I offenders who are named in any SSOSA evaluation in King County's possession. CP 150-52; CP 154-58.<sup>3</sup> Plaintiffs later moved for summary judgment and a permanent injunction under RCW 42.56.540, the provision of the PRA that authorizes injunctions against disclosure. CP 433-58. Plaintiffs argued that chapter 70.02 RCW prohibits the release of SSOSA evaluations. CP 450-53. After full briefing and argument, the trial court granted Plaintiffs' motion. CP 915-24. This appeal followed.

## ARGUMENT

### I. The legal framework of PRA exemptions

The PRA allows the public to inspect and copy public records, but also provides a number of exemptions to disclosure. "Some of these exemptions are contained within the PRA itself." *Doe ex rel. Roe v. Wash. State Patrol*, 185 Wn.2d 363, 371, 374 P.3d 63 ("*Doe*") (2016). One of these incorporated exemptions is for "[c]hapter 70.02 RCW," which the

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<sup>3</sup> In this consolidated case, a class of Level II and Level III sex offenders obtained a preliminary injunction enjoining blanket disclosure of sex offender registration records and SSOSA evaluations. CP 365-68. Though Ms. Zink raises arguments regarding the Level II and Level III plaintiffs, they do not appear to be part of this appeal. *See also* Respondent King County Br., p. 6; Statement of Interested Party John Doe 2, p. 1.

PRA says “applies to public inspection and copying of health care information of patients.” RCW 42.56.360(2).

The PRA also provides that public records are exempt from production if they fall within any “other statute which exempts or prohibits disclosure of specific information or records.” RCW 42.56.070(1); *see Doe*, 185 Wn.2d at 372. A statute qualifies as an “other statute” under the PRA “when the plain language of the statute makes it clear that a record, or portions thereof, is exempt from production.” *Id.* at 375. The other statute “does not need to expressly address the PRA, but it must expressly prohibit or exempt the release of records.” *Id.* at 372.

**II. Chapter 70.02 RCW prohibits King County from releasing SSOSA evaluations.**

SSOSA evaluations are exempt from the PRA because they qualify as exempt “health care information of patients” under chapter 70.02 RCW.

***A. SSOSA evaluations are exempt “health care information of patients” under chapter 70.02 RCW.***

The PRA explicitly incorporates certain aspects of chapter 70.02 RCW, also known as the Uniform Health Care Information Act (UHCIA). The PRA states that “[c]hapter 70.02 RCW applies to public inspection and copying of health care information of patients,” thus exempting the “health care information of patients” from PRA’s disclosure mandate. RCW 42.56.360(2); *see also Prison Legal News, Inc. v. Dep’t of Corr.*,

154 Wn.2d 628, 644, 115 P.3d 316 (2005). SSOSA evaluations qualify as “health care information of patients.”

Under chapter 70.02 RCW, “health care information” is defined as “any information, . . . recorded in any form or medium, that identifies or can readily be associated with the identity of a patient and directly relates to the patient’s health care.” RCW 70.02.010(16). A SSOSA evaluation fits that definition.

SSOSA evaluations can be performed only by certified health care professionals who have been specifically licensed by the Department of Health to evaluate and treat sex offenders. *See* RCW 9.94A.820(1); RCW 18.155.020. These professionals must “possess an underlying credential as a licensed health care professional,” and must “have extensive training in a mental health field, as well as specialty training in the evaluation and treatment of sexual offense behavior.” CP 1420, ¶ 11.

As the expert testimony in the record demonstrates, a SSOSA evaluation is no different from any other clinical evaluation by a mental health care provider. The Washington Association for the Treatment of Sexual Abusers (WATSA), through its leadership, testified that a SSOSA evaluation contains, among other things, the provider’s diagnostic impressions; an assessment of psychological, behavioral, and lifestyle factors; and a written treatment plan. CP 1419-20, ¶¶ 8-10. And, critically,

“the evaluator’s “clinical approach” to a SSOSA evaluation “is the same as the clinical approach of an evaluator conducting an intake for a non-criminal justice involved person seeking mental health treatment for a sexual behavior problem.” CP 1419, ¶ 8. The WATSA experts described in detail how SSOSA evaluations contain health care information protected by federal and state confidentiality laws. CP 1419-21 ¶¶ 9, 11-12 (describing consent forms, releases, and other confidentiality requirements for SSOSA evaluations).

This testimony is consistent with the statutorily declared purpose of SSOSA evaluations, which is to determine whether offenders are amenable to treatment. RCW 9.94A.670(3). To determine whether an offender is amenable to treatment for a condition—that is to say, amenable to health care—the evaluator must necessarily prepare a medical evaluation of the offender. *See, e.g.*, CP 1420, ¶ 10 (“a necessary part of SSOSA *treatment* is to target the individual’s changeable psychological, behavioral, and lifestyle factors that are associated with recidivism risk”). Such an evaluation is precisely the kind of information that “directly relates to the patient’s health care.” RCW 70.02.010(16). A SSOSA evaluation’s direct relation to medical treatment makes it quite different from an employer-administered drug test, which does not necessarily bear any relationship to medical treatment. *See Hines v. Todd Pac. Shipyards*

*Corp.*, 127 Wn. App. 356, 368, 112 P.3d 522 (2005) (drug test was condition of employment, and it was “undisputed that [its] purpose . . . was not health care or medical treatment”).<sup>4</sup>

An offender undergoing a SSOSA evaluation also qualifies as a “patient.” RCW 42.56.360(2) (exempting health care information “of patients”). Chapter 70.02 RCW defines a “patient” as “an individual who receives or has received health care.” RCW 70.02.010(31). And “health care,” in turn, is defined broadly to include “any care, service, or procedure provided by a health care provider” in order to “diagnose, treat, or maintain a patient’s physical or mental condition.” RCW 70.02.010(14). Only health care providers may perform SSOSA evaluations. RCW 9.94A.820(1); RCW 18.155.020; *see also* RCW 70.02.010(18) (defining “health care provider”). And in performing a SSOSA evaluation, the health care provider is providing a service that is intended to “diagnose” and “treat” the offender’s condition. In determining whether the offender is amenable to treatment, the health care provider is necessarily diagnosing the offender. *See* RCW 9.94A.670(3)

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<sup>4</sup> Case law similarly indicates that SSOSA evaluations are health care information. In *State v. A.G.S.*, the Supreme Court recognized that Special Sex Offender Disposition Alternative (“SSODA”) evaluations are “not court documents” but rather “a psychological report that includes a treatment plan.” 182 Wn.2d 273, 278, 340 P.3d 830 (2014). Both SSOSA and SSODA evaluations serve a similar purpose and must include similar content. *Compare* RCW 9.94A.670 (SSOSA), *with* RCW 13.40.162 (SSODA).

(evaluation is needed to “determine whether the offender is amenable to treatment”); CP 1419, ¶ 8 (evaluation “identif[ies] and describe[s] an individual’s psychological, behavioral, and lifestyle factors . . . to determine amenability to treatment”). And, in proposing a treatment plan, *see* RCW 9.94A.670(3)(b), the health care provider is helping to treat the offender; an offender cannot be treated without a plan of treatment.

A SSOSA evaluation, then, is performed by a health care professional who treats the offender as a patient and employs normal clinical methods to produce an assessment of the offender’s condition and formulate a treatment plan. The SSOSA evaluation is treated by the health care provider and patient as confidential health information protected by federal and state laws. If a SSOSA evaluation is not the “health care information” of a “patient” under chapter 70.02 RCW, it is difficult to see what kind of health care information would *not* potentially be subject to public disclosure.

***B. SSOSA evaluations are independently exempt from disclosure under RCW 70.02.230***

Chapter 70.02 RCW contains another exemption that applies to SSOSA evaluations. RCW 70.02.230 provides that “[i]nformation and records related to mental health services are confidential.” “Information and records related to mental health services,” in turn, are defined as “a

type of health care information . . . compiled, obtained, or maintained in the course of providing services by a mental health service agency or mental health professional to persons who are receiving or have received services for mental illness.” RCW 70.02.010(21). The professionals who perform SSOSA evaluations certainly qualify as “mental health professional[s],” RCW 70.02.010(27), since only certified sex offender treatment providers may perform SSOSA evaluations. CP 1420, ¶ 11 (“CSOTPs are required to have extensive training in a mental health field”); *id.* (“[i]t is the position of WATSA that SSOSA evaluators and treatment providers are mental health professionals who are required by law to comply with the legal requirements of ...mental health evaluations and treatment.”). Mental health professionals conducting SSOSA evaluations for offenders take the same clinical approach as they would for any person seeking mental health treatment for a sexual behavior problem. CP 1419-20, ¶¶ 9, 12. And mental health professionals treat SSOSA evaluations as mental health records, which release and distribution is governed by federal and state laws regarding mental health records. *Id.* For this reason too, SSOSA evaluations are exempt from disclosure under RCW 70.02.230.

### III. *Koenig* does not control this case.

On appeal, Ms. Zink renews her argument that *Koenig v. Thurston County*, 175 Wn.2d 837, 287 P.3d 523 (2012) (“*Koenig*”) controls the outcome of this case. But *Koenig* held merely that SSOSA evaluations do not fall under RCW 42.56.240(1)’s “investigative records” exemption from disclosure. *Koenig*, 175 Wn.2d at 849. *Koenig* cannot be read to dispose of every possible exemption to the PRA, including those that *Koenig* does not discuss. “In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised.” *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 824, 881 P.2d 986 (1994).

The limited reach of *Koenig* is confirmed by the Court of Appeals’ opinion in that case. There, the Court of Appeals held that Thurston County had waived any argument that the UHCIA, chapter 70.02 RCW, prohibited disclosure. *Koenig v. Thurston Cnty.*, 155 Wn. App. 398, 418, 229 P.3d 910 (2010), *aff’d in part and rev’d in part on other grounds*, 175 Wn.2d 837. It is unsurprising that the Supreme Court did not discuss an argument waived at the Court of Appeals. It is irrelevant, therefore, that Thurston County or *amici* discussed the UHCIA in their briefs. *Cf.* Zink Br. 45-46.

To argue otherwise, Ms. Zink relies on the standard of review in PRA cases, which is de novo. Zink Br. 45. Ms. Zink conflates standards of review with issue preservation. Even when an appellate court reviews a trial court de novo, it will typically not reach arguments that were not presented to the trial court. Thus, for example, the Supreme Court declined to consider a federal preemption issue that was not presented to the trial court, *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 853, 50 P.3d 256 (2002), even though preemption is a question of law reviewed de novo, *McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 100, 233 P.3d 861 (2010). *See also, e.g., Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 252, 961 P.2d 350 (1998) (on an appeal from summary judgment—which is reviewed de novo—declining to reach an argument not argued below). It was in accordance with this rule that the *Koenig* court declined to reach the issues it did not discuss. *Koenig* does not control.

#### **IV. The Trial Court Properly Enjoined Thurston County from Releasing SSOSA evaluations to Ms. Zink.**

Plaintiffs sought a preliminary and permanent injunction against disclosure under RCW 42.56.540.<sup>5</sup> Under that statute, a court may issue an

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<sup>5</sup> Ms. Zink incorrectly argues that the trial court's grant of preliminary injunction was in error. Zink Br., p. 41-44. First, the trial court applied RCW 42.56.540 and the preliminary injunction standard. *See* CP 146, ¶ 1. Second, the issue is moot because a permanent injunction was issued in this case. *See Ferry Cnty. Title & Escrow Co. v. Fogle's Garage, Inc.*, 4 Wn. App 874, 881, 484 P.2d 458 (1971); *see also, e.g.,* 43A

injunction if it finds (1) that the record names or specifically pertains to the party seeking an injunction; (2) that an exemption against disclosure applies; and (3) that “disclosure would not be in the public interest and would substantially and irreparably harm [the complaining] party or a vital government function.” *Ameriquest Mortg. Co. v. Office of Att’y Gen.*, 177 Wn.2d 467, 487, 300 P.3d 799 (2013) (citing RCW 42.56.540). After reviewing voluminous and unrebutted evidence, the trial court found that Plaintiffs had satisfied all of these requirements. CP 915-924.

***A. Detailed, unrebutted testimony supports the trial court’s findings that SSOSA evaluations contain health care information and that disclosure would substantially and irreparably harm the class members.***

The trial court found that “SSOSA evaluations are health care records, specifically records of specialized mental health treatment.” CP 921, ¶ 29. The trial court noted that Plaintiffs’ evidence that SSOSA evaluations were mental health records was “undisputed.” CP 919, ¶ 17. The trial court also found that Plaintiff submitted declarations from experts that were “credible and compelling evidence of the irreparable harm that will result from blanket or generalized disclosure of the Requested Records.” CP 919, ¶ 16.

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C.J.S. *Injunctions* § 14 (noting that grant of a preliminary injunction generally becomes moot after the trial court enters a permanent injunction). In any event, the trial court relied on the same legal standard and evidence in granting the preliminary injunction as the permanent injunction. *Compare* CP 1177-1322 *with* 1323-1485.

Plaintiffs submitted testimony of experts explaining how SSOSA evaluations contain medical, mental health, and other personal information, along with the evaluator's diagnostic assessment of that information. Ms. Zink failed to submit any evidence rebutting the expert's testimony on this point

For example, the Plaintiffs submitted testimony from Brad Meryhew, an attorney who is a member of the Sex Offender Policy Board and who has represented hundreds of sex offenders over a distinguished career. CP 1404-05, ¶¶ 2-7. Based on his expertise, he testified that SSOSA evaluations "include not only an offender's history and details about their crime, but also intimate details about an offender's entire life," such as "past sexual partners, victims and non-victims, and the details of their sexual activities." CP 1406, ¶ 11. They "also include the intimate details of an offender's marriage or significant relationships." *Id.* at ¶ 12.

Plaintiffs submitted similar particularized testimony from WATSA, through its experts explaining that SSOSA evaluations

include a personal history (including a psychosexual history), an assessment of current functioning, a mental health diagnosis (when indicated), and a proposed set of treatment goals....

CP 1419, ¶ 8. The SSOSA evaluations are a necessary part of developing a treatment plan to decrease the patient’s risk to sexually reoffend and “almost always includes other treatment goals as well.” CP 1420, ¶ 11.

Plaintiffs’ experts also testified regarding the irreparable harm that disclosure of this private information would cause on the sex offenders and any third-parties (like spouses, past sexual partners or victims) mentioned in the SSOSA evaluations. One expert, Brad Meryhew testified:

Psychosexual evaluations include not only an offender’s history and details about their crime, but also intimate details about an offender’s entire life. This often includes identifying all of their past sexual partners, victims and non-victims, and the details of their sexual activities. It includes uncharged offenses that have often been committed against **family members, neighbors, and others who are easily identifiable in the evaluation.**

CP 1406, ¶ 11 (emphasis added). The expert concluded that “[d]isclosure of one’s past sexual history, often including embarrassing and very detailed accounts of sexual activity, would no doubt be traumatizing and humiliating for past sexual partners and others named in a defendant’s life history.” CP 1406, ¶ 12.

Plaintiffs corroborated this expert testimony. Plaintiff John Doe B testified that his SSOSA evaluation included “a lot of personal information in it, including medications I’ve been taking and information about my past medical conditions. It also has personal information about my wife and my

private relationship with her.” CP 1480, ¶ 4. Plaintiff John Doe J testified that in order to see if he would be eligible for a SSOSA,

I had to complete a psychosexual evaluation with a treatment provider. During the evaluation I remember I had to do a polygraph and they asked me a lot of questions about myself and all the people I’d had sex with and my preferences. They asked me about my medical history and my family history too.

CP 1484, ¶ 3. John Doe J was granted a SSOSA and completed 4 years of SSOSA therapy and 3 additional years of probation with no subsequent conviction since 1996. *Id.* at ¶ 4. He was relieved of the requirement to register as a sex offender in 2013. *Id.* at ¶ 6. John Doe J testified that if his SSOSA evaluation was released, “it would be the end of everything for me. It would be like punishment all over again. It would make release of registration meaningless. It would ruin me.” *Id.* at ¶ 10.

This testimony from both expert and fact witnesses describing the disastrous harm in disclosing SSOSA evaluations is detailed and unrebutted. The trial court did not error by finding it credible.

***B. Detailed, unrebutted testimony supports the trial court’s finding that release of SSOSA evaluations would not be in the public’s interest.***

The trial court found that “‘Blanket’ or generalized disclosure of the Requested Records would not be in the public interest.” CP 933, ¶ 34. This finding was based on substantial evidence. Plaintiffs submitted evidence showing that mass disclosure of SSOSA evaluations would injure the public

interest because it would (1) discourage offenders from seeking evaluations, or from being candid with their evaluators; (2) re-traumatize victims; and (3) disclose sensitive health information.

*First*, the public has an interest in the proper operation of the SSOSA system, which requires that offenders actually seek evaluation and be candid with their evaluations. *See Koenig*, 175 Wn.2d at 847 (“We do not doubt the value of SSOSA evaluations. Indeed, we have recognized that the legislature developed this sentencing alternative for first time offenders to prevent future crimes and protect society.”). Experts who have represented sex offenders in the SSOSA process testified that

general public disclosure of very intimate, personal details about themselves, their family, and all of their past sexual partners will undoubtedly lead many offenders to refuse to participate in valuation and assessment, and will lead others to offer less than complete information. This erosion of the quality of information available to the courts, treatment providers, corrections, and law enforcement will negatively affect public safety.

CP 1409, ¶ 20. WATSA also testified that

if an exception is made [to RCW 70.02 and HIPAA] for SSOSA treatment records and these become subject to public disclosure, this could significantly and negatively impact our ability to meaningfully engage offenders in the treatment process. It is further our position that by deterring meaningful participation in SSOSA treatment, release of these mental health records to the public would ultimately result in an increased – not decreased – risk to the community.

CP 1421, ¶ 14. Plaintiffs trusted that their SSOSA evaluations would be confidential which motivated them to seek the alternative treatment and complete it successfully. *See* CP 1485, ¶ 11 (“I never thought that my SSOSA evaluation would be given to anyone who wants it.”); CP 1480, ¶ 5 (“I gave that information in trust that the treatment provider would be able to diagnose my problem and make treatment effective.”). The testimony on which the trial court relied consisted of lay testimony and expert predictions rationally based on past experience and unrebutted by countervailing testimony.

*Second*, the public has an interest in not re-traumatizing victims of sex offenses by exposing them to the public. *See, e.g., State v. Kalakosky*, 121 Wn.2d 525, 547, 852 P.2d 1064 (1993) (noting that sexual assault victims need privacy in order to successfully recover, and observing that “[o]f recent years, legislatures and courts have attempted to provide rape victims some privacy rights”). The record supports that mass disclosure of SSOSA evaluations would re-traumatize a substantial number of victims and third parties.

SSOSA evaluations contain sensitive information about not just the offenders themselves, but also their victims and third parties. *See* CP 1406, ¶ 11. The victim’s identity will often be obvious from a SSOSA evaluation; disclosure of the SSOSA evaluation will thus disclose their identity and re-

traumatize them. CP 1410, ¶ 24 (“The disclosure of a relative perpetrator for example almost inevitably leads to the person they victimized being disclosed as the victim.”). Innocent spouses, children, and past sexual partners are also at risk of harm. *Id.*; *see also* CP 1480, ¶ 4; CP 1484, ¶ 3.

*Finally*, the public has an interest in preserving the confidentiality of sensitive health care information. *See Planned Parenthood of the Great N.W. v. Bloedow*, 187 Wn. App. 606, 628, 350 P.3d 660 (2015). As discussed in detail above, mass disclosure of SSOSA evaluations would release sensitive health care information.

***C. SSOSA evaluations are not sentencing or plea agreements.***

Ms. Zink argues that SSOSA evaluations are required to be open and available to the public pursuant to RCW 9.94A.475 and .480(1). Zink Br., p. 45. This is incorrect. RCW 9.94A.475 states that for certain felonies, “all recommended sentencing agreements or plea agreements and the sentences for [ ] felony crimes shall be made and retained as public records,” (emphasis added) not all documents recommending a particular sentencing alternative or disposition. As Brad Meryhew, a member of the Washington Sex Offender Policy Board describes, a SSOSA evaluation does not always result in a SSOSA. Instead, the number of sex offenders meeting the requirements for SSOSA sentencing has declined from approximately 40% to 15% between 1986 and 2004. CP 1407-08, ¶ 15.d.

The courts have recognized this distinction as well: *Koenig* describes the SSOSA evaluation not as a sentencing agreement but as “a basis for the court to impose sentencing alternatives.” *Koenig*, 175 Wn.2d at 849. Further, the Sentencing Reform Act contains standards “solely for the guidance of prosecutors” and may not be relied upon to create any enforceable rights.” RCW 9.94A.401.

**V. The *Doe* decision does not affect the trial court’s injunction.**

Earlier this year, in another Zink PRA case, the Supreme Court held that the Washington State Patrol was required to release sex offender registration records under the PRA, and that RCW 4.24.550 was not an “other statute,” RCW 42.56.070(1), prohibiting their release. *Doe ex rel. Roe v. Wash. State Patrol*, 185 Wn.2d 363, 385, 374 P.3d 63 (2016). These records did not include SSOSA evaluations, and instead consisted of principally of a copy of the State Patrol’s sex offender database. *See id.* at 367.

This decision does not affect the trial court’s decision to enjoin the blanket release of SSOSA evaluations. While *Doe* allows the public to learn class members’ identity as current or former registered offenders, it does not give the public access to SSOSA evaluations themselves, which are medical records far more sensitive than the fact of registration. Those evaluations contain extremely personal information about offenders, their

victims, and their families that cannot be gleaned from registration itself. As discussed above, *Doe* thus leaves unaffected the findings that Ms. Zink challenges here: that SSOSA evaluations contain extraordinarily sensitive personal and medical information about both the offender and others; that blanket disclosure of evaluations would discourage offenders from undergoing SSOSA evaluations or being candid in them; that disclosure would retraumatize victims; that disclosure of such sensitive information would hinder reintegration of offenders into the community; and that all these things would undermine the successful SSOSA system, thereby making the public less safe.

Given the Court's ruling on disclosure of sex offender registration records, the *Doe* Court declined to address the issues of pseudonymity and class certification as "moot" and "serv[ing] no purpose," respectively. *Id.* at 385. Plaintiffs provide the following briefing in the event this Court addresses these issues.

**VI. The trial court properly allowed Plaintiffs to proceed in pseudonym.**

The standard of review for orders granting leave to proceed anonymously is an abuse of discretion. *See Does I Thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1069 (9th Cir. 2000); *see also Doe*, 185

Wn.2d at 385 (“Whether trial court abused its discretion by allowing plaintiffs to proceed in pseudonym is “moot”).

Without sealing court filings from public access, the trial court allowed Plaintiffs to proceed in pseudonym. CP 150-52. Ms. Zink challenges this decision as an improper order to seal. Plaintiffs’ response to Ms. Zink’s arguments proceeds in two steps. Plaintiffs first explain why the trial court’s decision does not amount to an order to seal. Plaintiffs next show that the court’s decision should be affirmed under well-established principles governing pseudonymity.

***A. By allowing Plaintiffs to proceed pseudonymously, the trial court was not sealing documents.***

GR 15 defines what it means to seal a document. “To seal,” the rule says, “means to protect from examination by the public and unauthorized court personnel.” GR 15(b)(4). An order to redact “shall be treated as . . . [an] order to seal,” and to redact means to protect “a portion or portions of a specified court record” from “examination by the public and unauthorized court personnel.” GR 15(b)(4), (5).

Under GR 15, then, a court filing is sealed or redacted when the filing, or portions of it, are available to the court, but not available to the public. Here, though, everything available to the trial court was also available to the public.

Washington precedents on sealing also suggest that pseudonymous litigation does not amount to sealing. In adopting a presumption against sealing, for example, our Supreme Court relied on the public’s “right of access to court proceedings” under the Washington Constitution. *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982). “[T]o maintain public confidence in the fairness and honesty of the judicial branch,” the public has a right “to access open courts where they may freely observe the administration of civil and criminal justice.” *Rufer v. Abbott Labs.*, 154 Wn.2d 530, 542, 114 P.3d 1182 (2005) (citation omitted). As the Supreme Court, quoting a trial court, has observed, the public presumptively has access to “[e]verything that passes before this Court.” *Id.*

Here, allowing Plaintiffs to proceed pseudonymously did not abridge the public’s right to access anything that passed before the trial court. It did not deprive the public of any information that the trial court possessed or prevent the public from scrutinizing the trial court’s decisions.

Plaintiffs’ names, therefore, resemble the “information surfacing during pretrial discovery that does not otherwise come before the court.” *Rufer*, 154 Wn.2d at 541. Because that information “does not become part of the court’s decision making process,” the public rights that apply to

court filings “do[] not speak to its disclosure.” *Dreiling v. Jain*, 151 Wn.2d 900, 910, 93 P.3d 861 (2004). Thus, “there is not yet a *public* right of access with respect to these materials,” and only “good cause” need be shown before those materials may be restricted. *Rufer*, 154 Wn.2d at 541 (citation and internal quotation marks omitted). And here, as explained below, Plaintiffs showed good cause for pseudonymity at all relevant times.

***B. The court acted within its discretion when it allowed Plaintiffs to proceed pseudonymously.***

While CR 10(a)(1) provides that complaints “shall include the names of all the parties,” it is silent about whether parties may use a *pseudonym*. Our Supreme Court, however, has said in passing that “a plaintiff may proceed under a pseudonym to protect a privacy interest.” *N. Am. Council on Adoptable Children v. Dep’t of Soc. & Health Servs.*, 108 Wn.2d 433, 440, 739 P.2d 677 (1987). The federal courts, whose Federal Rule of Civil Procedure 10(a) is materially identical in relevant part to CR 10(a)(1), have come to the same conclusion. *See Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 189 (2d Cir. 2008) (citing cases); *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000) (same). These federal courts have identified many factors that may be considered when a court exercises its discretion to permit proceeding in

pseudonym—cautioning always, though, that any list is “non-exhaustive” and that courts should take into account other factors relevant to the particular case at hand. *Sealed Plaintiff*, 537 F.3d at 189–90.<sup>6</sup>

The trial court recognized that only pseudonymity could give Plaintiffs meaningful access to injunctive relief. It stated that “[f]orcing Plaintiffs to disclose their identities to bring this action would eviscerate their ability to seek relief.” CP 151, ¶ 2. In so finding, the trial court did not abuse its discretion.

Courts agree that use of pseudonyms is appropriate when “the injury litigated against would be incurred as a result of the disclosure of the plaintiff’s identity.” *See M.M. v. Zavaras*, 139 F.3d 798, 803 (10th Cir. 1998) (citation omitted). Here, as the trial court noted, the very harm that Plaintiffs sought to prevent in bringing this action would have been realized if the trial court had forced Plaintiffs to publicly disclose their identities. *See Doe v. Harris*, 640 F.3d 972, 973 n.1 (9th Cir. 2011) (allowing Plaintiff “to continue to proceed under a pseudonym because drawing public attention to his status as a sex offender is precisely the consequence he seeks to avoid by bringing this suit”); *Roe v. Ingraham*, 364 F. Supp. 536, 541 & n.7 (S.D.N.Y. 1973) (permitting plaintiffs to

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<sup>6</sup> Because no appellate case law in Washington speaks to when and how parties may proceed in pseudonym, Plaintiffs rely here on persuasive federal authorities.

proceed in pseudonym in challenging the constitutionality of a statute requiring disclosure of their identities as individuals prescribed narcotic drugs). It would also have undermined the PRA itself, which permits challenges to the release of records by individuals named in the records. *See* RCW 42.56.540. Indeed, forcing Plaintiffs to disclose their identities to access the only relief available—court protection of exempt records—would have raised serious due process concerns. *Cf. Bodie v. Connecticut*, 401 U.S. 371, 376–77 (1971) (recognizing a due process right of access to the courts when judicial review is necessary to resolve a dispute).

The trial court determined that disclosing Plaintiffs’ identities would cause them permanent harm and that the Plaintiffs faced “a significant risk of physical, mental, economic, and emotional harm if their identities are disclosed.” CP 151, ¶ 3. This determination was correct.

Like the trial court here, other courts have allowed anonymity for plaintiffs “when identification creates a risk of retaliatory physical or mental harm” and “when anonymity is necessary to preserve privacy in a matter of sensitive and highly personal nature.” *Does I Thru XXIII*, 214 F.3d at 1068 (citations and internal quotation marks omitted). Courts have permitted the use of pseudonym by individuals who receive mental health treatment when the case would necessarily reveal their illness or treatment. *See, e.g., Doe v. Colautti*, 592 F.2d 704, 705 (3d Cir. 1979)

(pseudonym used by plaintiff challenging state benefits for hospitalization in private mental institutions); *Doe v. Hartford Life & Accident Ins. Co.*, 237 F.R.D. 545, 549–50 (D.N.J. 2006) (collecting and discussing cases). Additionally, courts have allowed parties to proceed in pseudonym “when nondisclosure of the party’s identity is necessary to protect a person from harassment, injury, ridicule or personal embarrassment.” *Does I Thru XXIII*, 214 F.3d at 1067–68 (citation, alteration, and internal quotation marks omitted).

Those factors are present here. Plaintiffs and experts familiar with the treatment of sexual offenders attested that, if Plaintiffs were publicly identified as registered sex offenders, they would face physical and verbal abuse, harassment, economic loss, and psychological harm. *See, e.g.*, CP 378–79, 404, 411, 416, 429, 434. Experts in the treatment of sexual offenders also attested that broad-based dissemination of mental health treatment records will undermine the efficacy of the treatment process. *See* CP 411–12, 416. The trial court did not abuse its discretion by finding this un rebutted testimony credible.

The trial court also recognized that the public has a reduced interest in the Plaintiffs’ names. And, in finding that the public’s interest in these proceedings would not be meaningfully compromised, the trial court determined that “[t]he names of individual Plaintiffs have little

bearing on the public's interest in the dispute or its resolution." CP 151, ¶ 4. In so reasoning, the trial court did not abuse its discretion: "[W]here a lawsuit is brought solely against the government and seeks to raise an abstract question of law that affects many similarly situated individuals, the identities of the particular parties bringing the suit may be largely irrelevant to the public concern with the nature of the process." *See Doe v. Del Rio*, 241 F.R.D. 154, 158 (S.D.N.Y. 2006). The primary questions in this case are legal questions of statutory interpretation that affect hundreds, if not thousands, of people that are similarly situated to the Plaintiffs. Plaintiffs represent a certified class of those people. Under these circumstances, the precise names of the named Plaintiffs have little bearing on the public's interest in this case.

The trial court also did not abuse its discretion when it found that Ms. Zink would not be prejudiced by allowing Plaintiffs to proceed in pseudonym. CP 151, ¶ 5. Ms. Zink failed to challenge the Plaintiffs' credibility, for example.

Next, the trial court was within its discretion to find that Plaintiffs' privacy interests in proceeding pseudonymously outweighed the public's interest in their identity. CP 151, ¶ 6. At the time, the public's access to the case was not limited apart from being unable to determine the identities of Plaintiffs. And, in a case like this, the Plaintiffs' identities are

largely irrelevant. *See Doe v. Del Rio*, 241 F.R.D. at 158. Thus, the public's minimal interest in learning Plaintiffs' names is outweighed by Plaintiffs' interest in meaningful access to judicial review and in avoiding harm to themselves and their loved ones.

Finally, the trial court found that there was "no reasonably viable alternatives to redress" the concerns that Plaintiffs sought to address by proceeding in pseudonym. CP 151, ¶ 7. The trial court's finding on this point was not an abuse of discretion, particularly since Ms. Zink has suggested no alternative that could protect Plaintiffs' interests. *See Doe*, 185 Wn.2d at 365, fn. 6 (noting Ms. Zink rejected remedy of remand to trial court to apply *Ishikawa* factors).

**VII. The trial court acted well within its discretion by certifying a class.**

The trial court certified a Plaintiff class defined as: "All individuals named in ... SSOSA evaluations in the possession of King County and classified as sex offenders at Risk Level I, who are either compliant with the conditions of registration or have been relieved of the duty to register." CP 157. Ms. Zink challenges this class certification. She does not argue that the trial court misapplied CR 23. Rather, she argues that the PRA forecloses class actions altogether. According to Ms. Zink, each "person who is named in the record or to whom the record specifically pertains,"

must be joined as a party under RCW 42.56.540. This argument should be rejected. It conflicts with the civil rules and binding precedent interpreting those rules, and it also misunderstands the nature of class actions.

The purposes of CR 23 is to avoid multiplicity of litigation, save members of the class the burden of filing individual suits, and free defendants from having to respond to identical future litigation. *Moeller v. Farmers Ins. Co. of Wash.*, 173 Wn.2d 264, 278, 267 P.3d 998 (2011). A trial court should err in favor of certifying a class, and its decision to grant certification is reviewed for abuse of discretion. *Id.* Here, the purposes of CR 23 are served by certifying classes of plaintiffs. Ms. Zink has made numerous similar PRA requests for blanket release of documents regarding sex offenders.<sup>7</sup> See CP 1330-90. Certifying classes reduces the need for each individual sex offender and also Ms. Zink to undertake multiple duplicative litigation involving the same question of law.

Ms. Zink does not deny that CR 23 itself allows class certification in this case, the trial court's certification decision should be affirmed.

After all, “[c]lass certification is governed by CR 23.” *Moeller v. Farmers*

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<sup>7</sup> For example, the issue of whether SSOSA evaluations are health care records exempt from blanket disclosure under the PRA is pending in several other cases where classes were certified: *Donna Zink v. Pierce County, et al.*, Cause No. 48378-5-II (Div. II); *Thurston County et al. v. Zink*, Cause No. 48000-0-II (Div. II); and *John Doe G et al. v. Dep't of Corrections*, Cause No. 74354-6-I (Div. I). Ms. Zink was the requestor in each of those cases.

*Ins. Co. of Wash.*, 173 Wn.2d 264, 278, 267 P.3d 998 (2011). And civil rules like CR 23 “govern all civil proceedings” except when they are “inconsistent with rules or statutes applicable to special proceedings.” CR 81(a). The PRA, however, is not one of those “statutes applicable to special proceedings.” As the Supreme Court has held, the PRA does “not create a special proceeding subject to special rules,” so “the normal civil rules are appropriate for prosecuting a PRA claim.” *Neighborhood Alliance of Spokane Cnty. v. Cnty. of Spokane*, 172 Wn.2d 702, 716, 261 P.3d 119 (2011). Hence, CR 23 controls here, and under it certification was appropriate.

More fundamentally, Ms. Zink’s argument misunderstands the representative nature of class actions. In a class action, representative plaintiffs stand in for all the other members of the class. Those members are then treated as parties to the litigation. *See Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979) (class actions are “an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only,” and holding that a class action could be maintained even under a statute that referred merely to an “individual”). That is why a class-action judgment binds all unexcluded members of the class.

CR 23(c)(3).

The representative nature of class actions also means that even a statute phrased in individual terms will allow for a class action. So, for example, even though the Consumer Protection Act authorizes money damages and injunctive relief only to those who “bring a civil action,” RCW 19.86.090, the Court of Appeals has held that this provision applies not only to the named plaintiffs, but “to the represented class members” too. *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 346, 54 P.3d 665 (2002). Even though those class members did not bring the action at first, they are deemed to be present as parties through the class-action mechanism.

For the same reason, the PRA does not forbid class actions. Through CR 23, class representatives stand in for all other class members “named in [a] record or to whom [a] record specifically pertains.” RCW 42.56.540. If the class representatives’ “motion and affidavit[s]” supply proof that records name or specifically pertain to both the class representatives and the other members of the class, *id.*, then a classwide injunction under RCW 42.56.540 is proper. Because Plaintiffs supplied precisely that proof here, the trial court’s class certification and classwide injunction was proper.

**CONCLUSION**

The trial court's class certification and order allowing Plaintiffs to proceed in pseudonym, and the trial court's summary judgment permanent injunction orders regarding SSOSA evaluations, should be affirmed.

RESPECTFULLY SUBMITTED this 10th day of October, 2016.

ENSLOW MARTIN PLLC

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**CERTIFICATE OF SERVICE**

I, Margaret J. Pak, certify under penalty of perjury that true and correct copies of the above attached document were delivered as follows via email service:

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SUPERIOR COURT OF WASHINGTON  
STANLEY M. STAMERSON

Executed at Seattle, Washington, this 10th day of October, 2016.

*Margaret J Pak*  
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Margaret J. Pak