IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID MCNEELY and 5 ALPHA INDUSTRIES, LLC; and JOHN DOE

Petitioners,

v.

THE SECOND JUDICIAL DISTRICT COURT, STATE OF NEVADA, WASHOE COUNTY, and THE HONORABLE DAVID A. HARDY, DISTRICT COURT JUDGE, DEPT. 15

Respondents,

And

HILLARY SCHIEVE; and VAUGHN HARTUNG

Real Parties of Interest

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REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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I. INTRODUCTION

The solitary issue before this Court is whether Plaintiffs, who are both public officials, can compel the disclosure of the identity of Petitioner John Doe in derogation of Mr. Doe's First Amendment rights. They cannot.

Free speech, said Frederick Douglass, "is the dread of tyrants. It is the right which they first of all strike down."[1] In this case, Plaintiffs are attempting to use the Nevada courts to strike down the First Amendment rights of Petitioner John Doe. The Court should not countenance this invasion.

The right to engage in anonymous political conduct is a cornerstone of liberty. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341–342 (1995) (recognizing that anonymity for fear of official retaliation implicates First Amendment concerns and protections). Political conduct includes the right to hire an investigator to investigate public officials. *See Tichinin v. City of Morgan Hill*, 99 Cal. Rptr. 3d 661, 678 (2009). Thus, as an exercise of his First Amendment rights, John Doe may anonymously hire an investigator to investigate Respondent public officials.

Plaintiffs dread the particular form of First Amendment conduct. And they want their pound of flesh. But the pound of flesh Plaintiffs seek comes at the cost of John Doe's First Amendment rights. Plaintiffs should not be allowed to collect the

[1] Douglass, Frederick, A Plea for Free Speech in Boston (Dec. 10, 1860).

discovery at issue here unless they can prove that information pertaining to John Doe's identity is highly relevant to their claims, and that the need for the discovery outweighs John Doe's interest in anonymity. *Perry v. Schwarzenegger*, 591 F.3d 1126, 1140–41 (9th Cir. 2009). Plaintiffs have not and cannot meet this burden.

Accordingly, for the reasons detailed below, the Court should issue a writ of mandamus or prohibition prohibiting the disclosure of John Doe's identity.

II. ARGUMENT

A. John Doe's Hiring of a Licensed Investigator Was Protected Conduct in Furtherance of His First Amendment Right to Free Speech and Right to Petition.

Plaintiffs' argument against John Doe's First Amendment privilege starts from a flawed premise that "this matter involves non-expressive conduct—the installation of a GPS surveillance device via trespass—that does not warrant First Amendment protection." [AB, p. 23.]

But Plaintiffs miss two critical concepts.

First, John Doe did not place GPS devices on Plaintiffs' vehicles—he hired the Investigator Defendants to investigate allegations of misconduct involving two elected officials. [*See* 1 SA17-18; *see also* 1 SA136 (police report)[2].] As it pertains

[2] Subsequent to the filing of John Doe's Supplement to the Petition in this matter, John Doe filed a motion for a protective order in the district court. That motion has been fully briefed, and the district court has referred the matter to the Discovery Commissioner, along with Plaintiffs' Motion to Strike. The district court has also issued an order granting in part the Investigator Defendants' motion to dismiss.

to John Doe, this case most certainly implicates protected First Amendment conduct—or more precisely, implicates conduct "in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." *Delucchi v. Songer*, 133 Nev. 290, 299, 396 P.3d 826, 833 (2017).

Second, John Doe's desire to anonymously engage in conduct in furtherance of his First Amendment rights to free speech and to petition is also protected by the First Amendment, as is well-established by decades of precedent.

Taken together, both concepts—that the hiring of an investigator to investigate potential misconduct by elected officials is conduct in furtherance of a First Amendment right, and that a person has a right to anonymously engage in political conduct—demonstrate that John Doe has a First Amendment privilege against discovery of evidence regarding his identity.

1. Hiring an Investigator to Look Into Allegations of Misconduct is An Act In Furtherance of The First Amendment Rights to Speech and Petition.

As John Doe has asserted since his appearance below, and as Respondent Schieve knew prior to filing suit, John Doe hired the Investigator Defendants solely to investigate allegations of misconduct by Plaintiffs—an issue that would be of

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Accordingly, John Doe has submitted a Supplemental Appendix ("SA") concurrent with the filing of this Reply. This new SA resumes bates labeling where John Doe's prior SA left off.

public interest and importance if true. [1 SA136[3].] Rather than baselessly make accusations against Plaintiffs, John Doe took a logical, reasonable, and legal step to further his First Amendment rights to speech and to petition: he hired the Investigator Defendants to investigate the Plaintiffs and determine whether there was any substance to the allegations. [*Id.*]

As this Court has held in the context of anti-SLAPP cases, a defendant's *conduct* constitutes "good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern" if it falls within one of the enumerated categories of protected communications in NRS 41.637 and "is truthful or made without knowledge of its falsehood." *Delucchi v. Songer*, 133 Nev. 290, 299, 396 P.3d 826, 833 (2017) (citation omitted). Thus, this Court has already recognized that *conduct* can be entitled to First Amendment protection. And at least one court has recognized that hiring an investigator to investigate allegations of misconduct by public officials is conduct that is entitled to protection pursuant to the First Amendment. *See Tichinin v. City of Morgan Hill*, 99 Cal. Rptr. 3d 661, 678 (2009).

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[3] [November 8, 2022 Sparks Police Department Report stating that McNeely informed detectives "the motive behind the investigation was political" and that "there were allegations" that the "investigation completely unfounded the allegation[s]"]; *See also id* at 1 SA137 ("I explained [to Schieve] the private investigator was hired to investigate an allegation. The private investigator told us the allegation was determined to be false as a result of the investigation.").]

This case bears many similarities with *Tichinin.* In that case, Tichinin, a local attorney, hired an investigator on behalf of a client to look into a rumor circulating in Morgan Hill that the city manager and the city attorney were having an affair. *Tichinin*, 117 Cal.App.4th at 1056.

During the course of the investigation, the city manager discovered that he was under surveillance. *Id.* at 1058. The city manager reported his discovery to the City Council, which created a subcommittee to investigate. *Id.* The subcommittee in turn hired a private investigator, and eventually determined that Tichinin had been involved in the surveillance. *Id.* at 1059. The City Council then conducted a public hearing to consider taking punitive action against Tichinin. *Id.* At the conclusion of the hearing, the City Council adopted a resolution condemning Tichinin. *Id.* at 1060.

Tichinin filed a Section 1983 lawsuit against the City Council alleging violations of his right to petition and right to free speech, and the City Council responded with an anti-SLAPP motion, which the court below granted. *Id.*; *see also id.* at 1064, n.6 (discussing Tichinin's claims).

A threshold question the *Tichinin* Court considered on appeal was whether hiring a private investigator and investigating the rumored inappropriate relationship between the two city officials were protected under Tichinin's First Amendment rights of petition and free speech. *Id.* The court concluded that this conduct was

entitled to constitutional protection both as a matter of the right to petition and of the right to free speech.

The *Tichinin* Court explained that it considered the line of federal cases "persuasive authority for the proposition that non-petitioning conduct is within the protected 'breathing space' of the right of petition if that conduct is (1) incidental or reasonably related to an actual petition or actual litigation or to a claim that could ripen into a petition or litigation and (2) the petition, litigation, or claim is not a sham." *Id.* at 1068.

As the Court recognized, when one suspects that another person has caused harm, "a preliminary investigation is usually necessary in order to know whether one has a potential legal claim, evaluate the likelihood of success, and decide whether or not to assert it." *Id.* at 1068-69. Given the "close functional relationship" between investigation of a claim and the subsequent assertion of that claim, the court concluded, "[W]e consider it obvious that restricting, enjoining, or penalizing prelitigation investigation could substantially interfere with and thus burden the effective exercise of one's right to petition." *Id.* at 1069.

The *Tichinin* Court also concluded that Tichinin's conduct of hiring a private investigator "can also be considered protected under the right of free speech." *Id.* at 1074; *see also id.* at 1074-77 (compiling state and federal cases that "illustrate that the right of free speech protects . . . non-expressive conduct that intrinsically

facilitates one's ability to exercise the right of free speech, including lawful efforts to gather evidence and information about public officials concerning alleged improper or unlawful conduct").

The factual parallels between *Tichinin* and the instant case are undeniable. As in *Tichinin*, John Doe hired the Investigator Defendants to investigate what he believed to be credible allegations of misconduct. [1 SA17; 1 SA136.] Like *Tichinin*, John Doe had an interest in discovering whether there was any factual support for the allegations of misconduct and hired a licensed investigator to ferret out whether those allegations had any merit as a necessary preliminary step to exercising his rights to speak and/or petition.

Additionally, the potential for substantial interference with a person's right to petition about which the *Tichinin* Court expressed concern is playing out in the case before this Court. John Doe hired an investigator (with a promise that the investigator would keep his identity anonymous) to investigate allegations of misconduct by elected officials. Hiring the investigator to determine the veracity of the allegations was a sensible preliminary step in furtherance of John Doe's right to petition and right to speak about matters of public interest. Plaintiffs are now seeking to penalize John Doe for this conduct in furtherance of his First Amendment rights through this litigation.

In short, this case clearly implicates conduct that is protected by the First Amendment.

2. John Doe Has a Right to Anonymously Engage in Conduct in Furtherance of His First Amendment Right to Free Speech and His Right to Petition.

As Plaintiffs were aware before filing suit, "the motive behind the investigation was political[4];" John Doe wanted to anonymously hire an investigator to determine the veracity of the misconduct allegations rather than publishing[5] unconfirmed accusations. This matter therefore plainly implicates John Doe's First Amendment right to engage in anonymous political conduct.

Although Plaintiffs acknowledge John Doe has a right to gather information about elected officials [AB, pp. 26-27[6]], Plaintiffs reject out of hand (and with no citation to case law) that a person has a constitutional right to gather such information anonymously.

Plaintiffs' short-sighted analysis elides the decades of precedent affirming the right to engage in a wide array of anonymous political activities. The First

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[4] [1 SA136.]

[5] To be clear, John Doe uses the verb "publish" here to refer to the communication of potentially defamatory statements to third parties. PUBLISH (2), Black's Law Dictionary (11th ed. 2019) ("To communicate (defamatory words) to someone other than the person defamed.").

[6] ["[T]here is no dispute that a citizen or journalist can lawfully gather information about elected officials"]. Notably, John Doe's action here—hiring a private investigator—was entirely lawful.

Amendment protects against the disclosure of associational memberships absent a compelling state interest. *NAACP v. Alabama,* 357 U.S. 449 (1958); *accord Int'l Bhd. of Teamsters, Airline Div. v. Allegiant Travel Co.,* No. 2:14-CV-00043-APG, 2014 WL 6069851, at *8 (D. Nev. Nov. 12, 2014) (rejecting airline's request to compel union to disclose the identities of members of organizing committee). The First Amendment protects the right to distribute anonymous campaign literature. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *accord Am. C.L. Union of Nevada v. Heller,* 378 F.3d 979, 981 (9th Cir. 2004) (striking down as unconstitutional a Nevada statute requiring certain groups or entities publishing "any material or information relating to an election, candidate or any question on a ballot" to reveal on the publication the names and addresses of the publications' financial sponsors). The First Amendment protects the right to publish and distribute anonymous handbills. *Talley v. California*, 362 U.S. 60 (1960). The First Amendment protects the right to anonymous political canvassing. *Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002) (holding that a statute requiring individuals to obtain a permit before engaging in door-to-door advocacy and display the permit upon demand violated the First Amendment as applied to, *inter alia*, anonymous political speech); *see also Buckley v. Am. Const. L. Found., Inc*., 525 U.S. 182 (1999) (invalidating statute requiring initiative-petition circulators to wear identification badges bearing the circulator's name). The First

Amendment protects the right of individuals to anonymously donate to charitable organizations. *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2388 (2021) (holding that a regulation requiring tax-exempt charities to identify every major donor "creates an unnecessary risk of chilling").

Given the diverse types of anonymous political activities that fall within the ambit of the First Amendment, the anonymous political conduct here—anonymously retaining the service of a private investigator in furtherance of the exercise of the First Amendment rights to speech and petition—is likewise entitled to protection under the First Amendment.

Moreover, it is evident even from the slim record of this case that Plaintiffs' litigation chills not just John Doe's First Amendment rights, but also risks chilling the First Amendment rights of anyone who might want to employ the services of a licensed investigator to track down information on public officials—anonymously or otherwise.

3. Plaintiffs' Slim Case Citations Do Not Support Their Claims Because John Doe Did Not Direct the Investigator Defendants to Access Their Private Property.

Plaintiffs' arguments that John Doe's conduct does not implicate the First Amendment is further premised on the flawed assumption that he is responsible for the Investigator Defendants' decision to place tracking devices on their vehicles. [AB pp. 24-26.] No evidence bears this out.

John Doe did not direct the Investigator Defendants how to conduct their investigation. [1 SA17-18.] He therefore did not know or foresee exactly how the Investigator Defendants would conduct their investigation or what investigative tools or techniques they would employ. Again, the particular conduct John Doe engaged in—hiring an investigator to investigate claims regarding public officials—was distinct conduct that is entitled to First Amendment protections. The cases Plaintiffs cite do not warrant a contrary conclusion—in part because they are of no aid to this Court's analysis of John Doe's particular First Amendment assertions.

For example, in *Wright v. Incline Vill. Gen. Improvement Dist.*, 665 F.3d 1128 (9th Cir. 2011)[7], the Ninth Circuit was tasked with assessing whether beaches owned by a general improvement district were traditional public fora, and whether a local ordinance and local policy limiting public access to those beaches violated the First and Fourteenth Amendments. *Wright*, 665 F.3d at 1133. The *Wright* court's traditional public forum analysis, while interesting, is of no moment here. This case involves no public forum.

This Court faced a similar task in *S.O.C., Inc. v. Mirage Casino-Hotel*, 117 Nev. 403, 23 P.3d 243 (2001[8]). There, this Court considered whether privately

[7] [AB p. 24 (cited for the proposition that individuals "do not have a right to access private property for expression").]
[8] [AB pp. 24–25 (cited for the proposition that private property "is not subject to the reach of the First Amendment").]

owned sidewalks over which a governmental entity had been granted an easement were traditional public fora. Again, interesting, but irrelevant.

Plaintiffs argue that it is "immaterial" whether John Doe directly installed GPS devices on their vehicles. But the case they cite for that proposition, *Doe v. McKesson*, 71 F.4th 278 (5th Cir. 2023)[9], stands for the proposition that John Doe's lack of direct participation in the alleged tortious conduct is in fact very material.

There, the defendant allegedly organized, led, and gave orders at a demonstration that devolved into violence and looting.[10] Unlike *McKesson*, John Doe did not direct or actively participate in the investigation. Thus, unlike *McKesson*, John Doe did not authorize, direct, or ratify the specific tortious activity alleged here.[11] This fact—which Plaintiffs do not dispute—directly undermines their theory of liability. *McKesson*, 71 F.4th at 284 (explaining that "'where a defendant "authorized, directed, or ratified ***specific tortious activity***,' the First Amendment allows state law to impose liability for 'the consequences of that activity'") (quoting

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[9] [AB pp. 25-26]

[10] *See McKesson*, 71 F.4th at 281-82 ("McKesson directed the protest at all times, and when demonstrators looted a grocery store for water bottles to throw at the assembled police officers, he did nothing to try to discourage this, even though he remained in charge. After that, McKesson personally attempted to lead protesters onto a local interstate to obstruct traffic, a crime under Louisiana law.")

[11] Furthermore, McKesson's conduct would likely not have been entitled to First Amendment protection because it was incitement—one of the few "historical categories of unprotected speech" American jurisprudence recognizes. *Counterman v. Colorado*, ___ U.S. ___, 143 S.Ct. 2106, 2114 (2023) (quotation omitted). John Doe's conduct of hiring a licensed investigator, by contrast, was entirely legal.

NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927 (1982)[12]; emphasis added); *cf. Santopietro v. Howell*, ___ F.4th ___ 2023 WL 4568747, at *7 (9th Cir. 2023)[13].

Plaintiffs' errant citation to *Ringelberg v. Vanguard Integrity Pros.-Nevada*, No. 217CV01788JADPAL, 2018 WL 6308737 (D. Nev. Dec. 3, 2018)[14] for the proposition that placing a GPS device on a vehicle is "recognized tortious conduct" is an overstatement of the court's decision in that matter. *See Ringelberg*, 2018 WL 6308737 at *9 (opining that "the United States Supreme Court's decision in *United States v. Jones*[15] . . . ***suggests*** that Ringelberg had a reasonable expectation of privacy in his daily movements in his car").

Also, *Ringelberg* is at odds with post-*Jones* decisions in which courts have held that the placement of a GPS device on a vehicle is ***not*** a per se intrusion upon seclusion. *See, e.g.*, *Moran v. Lewis*, 114 N.E.2d 1254, 1256 (Neb. 2018) (finding allegations that a private citizen installed a GPS tracking device on another

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[12] (Holding that persons who participated in boycott of white businesses in effort to encourage racial justice reforms could be held liable for damages resulting from the tortious conduct of other boycott participants unless the individual had specific intent to further those illegal aims).

[13] "Even outside the context of protected First Amendment expressive association, 'a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause.' [Supreme Court precedents] make lucidly clear that the 'more' cannot consist of inferences of possible criminal involvement based solely on an individual's First Amendment-protected activities and associations." (quoting *Ybarra v. Illinois*, 444 U.S. 85, 91, (1979); other citations omitted).

[14] [AB p. 25.]

[15] 565 U.S. 400 (2012).

individual's motor vehicle to track its movement on public roads insufficient to establish a cause of action for invasion of privacy); *Troeckler v. Zeiser*, 2015 WL 1042187, *7, 2015 WL 1042187 (S.D. Ill. Mar. 5, 2015). (finding plaintiffs "failed to plead how a passerby on the street or an individual in another vehicle could not capture the same information that the tracking device captured and thus [ ] failed to plead the disclosure of a private fact." *Id.*).[16]

The plaintiffs there attempted to persuade the court that *Jones* supported their theory of invasion of privacy, the court correctly found *Jones* inapposite, explaining that the "***requirements for a search under the Fourth Amendment . . . , are different than the elements of the tort at issue***" because the tort of intrusion upon seclusion requires disclosure of a private matter or private fact in addition to an unauthorized intrusion or prying into the plaintiff's seclusion. *Troeckler*, 2015 WL 1042187, at *3 (emphasis added).

This is a significant distinction. The Supreme Court in Jones held that placement of a GPS tracking device on a vehicle and the use of the device constituted a search for purposes of the Fourth Amendment because "[t]he Government physically occupied private property for the purpose of obtaining information."

[16] Similarly here, the evidence Plaintiffs have disclosed reveals that the GPS device recorded Plaintiffs' movements on ***public streets***. [*See generally* RPA000079-183.]

Jones, 565 U.S. at 404. By contrast, this case is not about a government intrusion on private property for the purposes of gathering information.

B. Application of the *Perry* Test Requires Quashing Plaintiffs' Subpoena Because the Discovery Regarding John Doe's Identity is Not Highly Relevant to Their Claims.

1. The *Perry* Test is Applicable.

Plaintiffs maintain that "there is no justification for concealing John Doe's identity" under any balancing test because this matter does not involve expressive conduct. [AB, p. 23.] As set forth above, however, John Doe's conduct of hiring an investigator is entitled to First Amendment protection because it was conduct in furtherance of his First Amendment rights. Thus, this Court should follow the two-part framework articulated by the Ninth Circuit in *Perry v. Schwarzenegger*, 591 F.3d 1126 (9th Cir. 2009) to assess whether Plaintiffs' alleged need for discovery regarding John Doe's identity outweighs his constitutional interest in preventing such discovery.

Under the framework established in *Perry*, a party asserting the privilege "must demonstrate ... a 'prima facie showing of arguable first amendment infringement.'" *Id.* at 1140 (quoting *Brock v. Local 375, Plumbers Int'l Union of Am*., 860 F.2d 346, 349–50 (9th Cir.1988); other citation omitted). If the resisting party meets this initial burden, the evidentiary burden shifts to the party seeking discovery to "demonstrate a sufficient need for the discovery to counterbalance that

infringement." *Perry*, 591 F.3d at 1164. In meeting that burden, the party seeking discovery must establish not just that the discovery is generally relevant as is typically required by Fed. R. Civ. P. 26(b)(1) and NRCP 26(b)(1), but that the discovery is "***highly relevant***" to the claims or defenses. *Id.* "A good-faith interjection of First Amendment privilege to a discovery request . . . mandates a comprehensive balancing of the plaintiffs' need for the information sought against the defendants' constitutional interests in claiming the privilege." *Adolph Coors Co. v. Wallace*, 570 F. Supp. 202, 205 (N.D. Cal. 1983).

Other courts have provided varying formulations of the factors that are consistent with those identified in *Perry*, and consistently focus on (1) the relevance of the discovery sought, and (2) whether the interest in the discovery outweighs the likelihood of constitutional injury. *See, e.g., Adolph Coors Co.*, 570 F.Supp. at 208[17]; *Christ Covenant Church v. Town of Southwest Ranches*, No. 07-60516-CIV, 2008 WL 2686860, *8 (S.D. Fla. 2008)[18]. No matter which test the Court applies,

[17] Requiring courts to consider whether (1) a party has a compelling interest that bears a substantial relation to the disclosure sought, (2) whether the sought-after disclosure is the least restrictive means for accomplishing the party's objective "and will not unnecessarily sweep constitutional rights aside," and (4) whether the interest in disclosure outweighs the likelihood of injury to an association or its members if the information is released. (citations omitted).

[18] Requiring courts to consider (1) whether the party requesting discovery has shown that the information is so relevant that it "goes to the 'heart of the matter,'" (2) the availability of the information from alternative sources, (3) the nature of the information sought, including the likelihood of injury to the association or its members, if the desired information is released, (4) the requesting party's role in the

however, John Doe has made a prima facie showing that Plaintiffs' subpoenas infringe upon his First Amendment rights as set forth above and in his initial filing with this Court, and Plaintiffs have not met their burden of proving that the discovery sought is highly relevant to their claims.

2. Plaintiffs Have Not Established That Information Regarding John Doe's Identity is "Highly Relevant" to Their Claims.

Under the second prong of the *Perry* test, Plaintiffs bear the burden of demonstrating a sufficient need for discovery regarding John Doe's identity to counterbalance the infringement on his First Amendment rights. *Perry*, 591 F.3d at 1164. Plaintiffs have not met their burden here.

Plaintiffs assert they "need John Doe's identity to pursue their claims and complete discovery" [AB p. 29] but their explanation of "need" is not tethered to any of their claims. Rather, Plaintiffs assert that they need information regarding John Doe's identity because "revealing his true identity could establish that he is a clear and present danger to Plaintiffs" [AB p. 8] and because "they still may need to seek a protective order." [AB p. 29.] Plaintiffs offer no evidence (or really, any argument) to support their speculation that John Doe is a "clear and present danger."

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litigation, and (5) whether the disclosure sought constitutes the least restrictive means for accomplishing party's objective "and will not unnecessarily sweep constitutional rights aside." (citations omitted).

Indeed, the evidence Plaintiffs had ***almost a month before filing suit*** contradicts their inflammatory speculation.

When Schieve reported her discovery of the GPS device on her vehicle, detectives with the Sparks Police Department investigated her allegations. [1 SA133-138.] After determining that McNeely (a licensed investigator and retired law enforcement officer) had purchased the GPS device, they interviewed him about how the device ended up on Schieve's vehicle. [1 SA135-36.] McNeely told the detectives that he "uses a wide range of methods in his investigations as long as they are within the confines of the law," and that "there is no threat to [Schieve]. [1 SA136.] McNeely also told the detectives that "the intent behind the investigation was not to cause harm to anyone," that "the motive behind the investigation was political," that "the extent of the investigation was utilizing the electronic tracker to look at 'possible areas' where SCHIEVE was alleged to have been frequenting," and that "[n]o other surveillance methods were used." [*Id*.] McNeely further stated that the investigation he conducted "unfounded" the allegations he had been hired to look into. [*Id*.] The detectives relayed all of this information to Schieve. [1 SA137[19].]

[19] In addition to the police report which Plaintiffs produced, there is a video recording of Schieve's interview with the detectives available online at https://rumble.com/v270tuo-extraction-1.1-outside-agency-assist.mp4.html (last accessed July 17, 2023).

Schieve already knew all of this before filing suit on December 15, 2022. And as Plaintiffs themselves point out [AB p.1, n.1], because the Nevada Legislature enrolled legislation on May 31, 2023 prohibiting private persons from using GPS devices, there is no likelihood that the conduct they complain of will recur.[20] Plaintiffs' assertion that they need to know John Doe's identity to obtain a protective order therefore seems rather disingenuous, as the evidence they had prior to initiating litigation shows that (1) the intent behind the investigation, while political, was benign, (2) the use of the GPS device was the only investigative technique the Investigator Defendants used, (3) the GPS device was used for a limited purpose, and (4) that the investigation was done because it had "completely unfounded the allegation." [1 SA136].

Beyond the bald (and already rebutted) speculation that John Doe presents some sort of danger to them, Plaintiffs provide no guidance as to how John Doe's identity is relevant—much less highly relevant—to the specific causes of actions asserted in their amended complaint.

Because Plaintiffs' alleged need for discovery regarding John Doe's identity is unrelated to any claim or defense in this case and given that Plaintiffs know that John Doe's motives in investigating then were political in nature, it would appear

[20] *See* https://www.leg.state.nv.us/App/NELIS/REL/82nd2023/Bill/10252/Overview (Overview of legislative history of AB 356).

that Plaintiffs' interests in discovery regarding John Doe's identity are primarily (if not exclusively) retaliatory. The Court should not countenance such retaliatory attack on John Doe's First Amendment rights.[21]

C. Alternatively, This Court Could Remand This Case for Application of the Two-Part Test Created in *Highfields Capital Mgmt., LP v. Doe*.

To the extent the Court believes that the two-part framework discussed in *Perry* above applies solely to associational freedom claims, the Court should consider remanding this matter to the district court with instruction to apply the two-part test created by the court in *Highfields Capital Mgmt., LP v. Doe*, 385 F.Supp.2d 969 (N.D. Cal. 2005) and adopted by the United States District Court for the District of Nevada in *Fodor v. Doe*, 2011 WL 1629572 (D. Nev. Apr. 27, 2011).

In *Highfields*, an investment fund management firm obtained a subpoena requiring the host of an internet message board to reveal the identity of an anonymous defendant who had posted parodic messages critical of the firm. *Id.* at 972. The anonymous defendant moved to quash the subpoena. *Id.*

In granting the motion to quash, the court emphasized the First Amendment interests and policies raised by the defendant "are of considerable potential significance. Indeed, they are rooted in the First Amendment to the Constitution of

[21] Even if Plaintiffs' interests are not retaliatory, they are highly speculative. Speculation cannot justify intrusion on John Doe's First Amendment rights. *Cf. McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 218 (2014).

the United States. What defendant seeks to protect through his motion to quash is the right to express most effectively and anonymously, without fear of expensive adverse consequences, his views about matters in which many other members of the public are interested." *Id.* at 974-75. The *Highfields* court also found that enforcing a subpoena to unmask an anonymous defendant "poses a real threat to chill protected comment on matters of interest to the public." *Id.* at 980.

Under *Highfields*, a plaintiff must first establish "a real evidentiary basis for believing that the defendant has engaged in wrongful conduct that has caused real harm to the interests of the plaintiff that the laws the plaintiff has invoked were intended to protect." *Highfields*, 385 F.Supp.2d at 975. That evidence "must, if unrebutted, tend to support a finding of *each* fact that is essential to a given cause of action. The court may not enforce a subpoena if, under plaintiff's showing, any *essential* fact or finding lacks the requisite evidentiary support." *Id.* at 976 (emphases in original).

If the plaintiff satisfies the first prong of the *Highfields* test, the court must then "assess and compare the magnitude of the harms that would be caused to the competing interests by a ruling in favor of plaintiff and a ruling in favor of defendant." *Id.*; *accord Fodor v. Doe*, 2011 WL 1629572 at *3-4. The court, in turn, would only permit discovery of identity information if, "after careful assessment, the court concludes that enforcing the subpoena would cause relatively little harm to

the defendant's First Amendment and privacy rights and that its issuance is necessary to enable plaintiff to protect against or remedy serious wrongs." *Id.* at 976.

The *Highfields* test is in a sense more demanding than *Perry*. Rather than merely requiring a plaintiff to establish that identity information is "highly relevant" to their claims, *Highfields* requires a plaintiff to come forward with "*competent evidence*" that "address[es] *all* of the inferences of fact that a plaintiff would need to prove in order to prevail under at least one of the causes of action plaintiff asserts." *Highfields*, 385 F.Supp.2d at 975 (emphases in original). But under either test, the final and most critical thing a court must do is weigh the requesting party's need for the discovery against the resisting party's significant constitutional interests.

And here, for all the reasons set forth above and in his Supplement, John Doe has established that he has a colorable right to anonymously engage in conduct protected by the First Amendment. This right must be fully considered and weighed before allowing Plaintiffs to discovery regarding his identity.

D. Plaintiffs' Alleged Need for Information Sought by the Subpoenas is Moot Because Plaintiffs Already Have What They Want—John Doe's Participation in the Litigation.

In asserting that they still need the Investigator Defendants to respond to the subpoenas, Plaintiffs cite to case law addressing whether a plaintiff may prosecute a case anonymously. [AB, pp. 30, 31.] Those cases are of limited value here because

the analysis conducted by the courts turned on whether it was appropriate to allow the ***plaintiffs*** to anonymously avail themselves of the legal system.

Take, for example, the decision in *Doe No. 1 v. Wynn Resorts Ltd.*, No. 219CV01904GMNVCF, 2022 WL 3214651 (D. Nev. Aug. 9, 2022). [AB pp. 8, 30-31.] In that case, the ***plaintiffs*** moved for leave to proceed under fictious names. *Id.* at *1. In weighing the request, the court relied on the Ninth Circuit's decisions in *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058 (9th Cir. 2000), and *Doe v. Kamehameha Sch./Bernice Pauahi Bishop Est*., 596 F.3d 1036 (9th Cir. 2010). *See Wynn Resorts Ltd.*, 2022 WL 3214651 at *3-5.

The Ninth Circuit's analysis in *Kamehameha Sch.* is illustrative of the plaintiff-focused nature of Plaintiffs' cited cases. In assessing whether the minor plaintiffs there could proceed anonymously in a racial discrimination case, the court held that "the default presumption is that ***the plaintiffs*** will use their true names." *Kamehameha Sch.*, 596 F.3d at 1046 (emphasis added). This presumption, the court explained, "is loosely related to the public's right to open courts . . . ***and the right of private individuals to confront their accusers***." *Id.* at 1042 (emphasis added; citations omitted).

The Ninth Circuit's analysis in *Advanced Textile Corp.* likewise reflects a focus on what a ***plaintiff*** must establish in order to proceed anonymously. *See Advanced Textile Corp.*, 214 F.3d at 1068 (summarizing cases in which other federal

Courts of Appeals " have heard appeals from a district court's order refusing to allow plaintiffs to use pseudonyms"). The other Doe case Plaintiffs cite to in another part of their Answer also reflects an analysis on the factors a ***plaintiff*** must satisfy to proceed under a pseudonym.[22]

Thus, the concerns in *Wynn Resorts Ltd.* that led to the court's denial of leave to proceed anonymously are qualitatively different. In that case, a group of anonymous women, all of whom were Wynn Resorts employees, brought a Title VII suit against Wynn Resorts, claiming their employer allowed Steve Wynn to sexually harass them. *Wynn Resorts Ltd.*, 2022 WL 3214651 at *1. In denying the plaintiffs' request to remain anonymous, the court focused on the corporate defendants' need to defend themselves against their accusers. *Id.* at *9 ("The plaintiffs argue that Steve Wynn is a 'billionaire sexual predator' that invites negative media attention. This begs the question . . . regarding what type of prejudice accused perpetrators (who do not have the option to remain anonymous once the complaint is filed) face in having to defend themselves against unnamed accusers."); *see also id.* at *8 (Because "the mere filing of a civil action against ... private parties may cause damage to their good names and reputation," "basic fairness" dictates that plaintiffs who publicly accuse

[22] [AB p. 25 (citing *Doe v. McKesson*, 71 F.4th 278 (2023).] Although Plaintiffs cite the 2023 *McKesson* to support their argument against anonymity, the Fifth Circuit initially dealt with the plaintiff's request for anonymity in a 2019 decision. *See Doe v. McKesson*, 945 F.3d 818, 835 n.12 (2019).

defendants in civil suits "must [sue] under their real names.") (quoting *Doe v. Shakur*, 164 F.R.D. 359, 361 (S.D.N.Y. 1996); other citation omitted).

Here, by contrast, John Doe has not purposely availed himself of the legal system; Plaintiffs did. Plaintiffs—two elected officials with relatively high profiles in their community—have initiated this litigation and hauled John Doe into court. Plaintiffs are the parties that have publicly accused John Doe, and Plaintiffs are the parties using the discovery process to undermine John Doe's First Amendment right to remain anonymous. As the plaintiffs, Plaintiffs bear the burden of pleading claims for relief, NRCP 8, and identifying the parties in its pleadings, NRCP 10. And Plaintiffs ultimately have the burden of proving each of their claims against John Doe and the Investigator Defendants. The legal and policy concerns underpinning the cases Plaintiffs rely upon are therefore simply not the same in this case.[23]

Furthermore, the *Advanced Textiles* factors are of limited applicability in this case because John Doe's asserted right to anonymity is premised on his First Amendment rights, and his First Amendment privilege against discovery of his

[23] *See Painter v. Doe*, No. 3:15-CV-369-MOC-DCK, 2016 WL 3766466, at *7 (W.D.N.C. July 13, 2016) ("The sensitive nature of the issues in dispute in this case, the risk of retaliatory harm, ***and the fact that Defendant is an unwilling litigant in this case*** provide sufficient grounds to allow Defendant to proceed under a fictitious name.") (emphasis added); *see also Malibu Media, LLC v. Doe,* No. 13 C 6312, 2014 WL 2514643, at *5 (N.D. Ill. June 4, 2014) (rejecting plaintiff's argument that it was unfair to allow the defendant to proceed anonymously because "Defendant Doe did not choose to be named as a defendant in this copyright infringement action").

identity. The factors adopted by *Advanced Textiles*, on the other hand, are intended to guide district courts in determining whether the use of pseudonym is necessary to protect against ***retaliation***: (1) the severity of the threatened harm; (2) the reasonableness of the anonymous party's fears; (3) the anonymous party's vulnerability to such retaliation; (4) the precise prejudice at each stage of the proceedings to the opposing party and whether proceedings may be structured so as to mitigate that prejudice; and (5) whether the public's interest in the case would be best served by requiring that the litigants reveal their identities. *Advanced Textiles*, 214 F.3d at 1068 (citations omitted); *see also id.* at 1067-68 (noting that the Ninth Circuit allows parties to use pseudonyms "in the 'unusual case' when nondisclosure of the party's identity 'is necessary ... to protect a person from harassment, injury, ridicule or personal embarrassment.'").

Of course, John Doe has already been subjected to retaliation by way of this litigation—Plaintiffs are retaliating against John Doe for actions he took in furtherance of exercising of his First Amendment rights to free speech and to petition. But given the constitutional nature of his asserted right to anonymity, the *Advanced Textiles* factors do not provide a great tool for assessing whether to permit discovery regarding John Doe's identity. Hence, the *Perry* test and/or the *Highfields* test provide a more appropriate analytical framework for assessing both Plaintiffs'

need for the discovery and the potential harms to John Doe's First Amendment rights.

Moreover, the fact that courts permit parties to proceed pseudonymously deeply undercuts Plaintiffs' assertion that John Doe "cannot be deposed." [AB p. 31.[24]] In *Advanced Textiles*, for example, the Ninth Circuit found that "permitting plaintiffs to use pseudonyms will serve the public's interest in this lawsuit by enabling it to go forward." *Advanced Textiles*, 214 F.3d at 1073. If the Ninth Circuit had qualms that the defendants there could not conduct discovery against anonymous plaintiffs, it is unlikely they would have concluded that allowing pseudonyms would "serve the public interest." While discovery with an anonymous defendant may require more process and protection than in other, more typical civil cases, Plaintiffs have not presented any cognizable reasons why John Doe's anonymity acts as a bar to conducting discovery in this matter.[25]

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[24] Further, Plaintiffs are incorrect that John Doe is anonymous to this Court. [AB p. 6.] John Doe filed—and this Court accepted—a sealed NRAP 26.1 disclosure providing identity information sufficient for the justices of this Court to evaluate possible disqualification or recusal.

[25] Plaintiffs' speculation that John Doe might be required by campaign finance law to report his payments to the Investigator Defendants as a campaign contribution [AB pp. 28-29] is likewise a thin (and speculative) rationale for infringing on his First Amendment rights. Moreover, Plaintiffs have no standing to enforce Nevada's campaign finance laws. *See* NRS 294A.380 *et seq.* (provisions governing administration and enforcement). To the extent this argument is a veiled threat to report an alleged campaign finance violation, *see* NRS 294A.410(2), this is only further evidence of Plaintiffs' retaliatory motivations in this matter.

III. CONCLUSION

The First Amendment "reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quotation omitted). Because of this commitment to the free flow of ideas, the First Amendment's protections for the right of free speech and the right to petition are not conditioned on the popularity of the First Amendment conduct that is at issue. "In fact, it is the minority view, including expressive behavior that is deemed distasteful and highly offensive to the vast majority of people, that most often needs protection under the First Amendment." *Bible Believers v. Wayne Cnty., Mich*., 805 F.3d 228, 243 (6th Cir. 2015).

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John Doe's conduct here—hiring the Investigator Defendants to investigate Plaintiffs—is not popular. But that does not mean that his conduct is unprotected or that he is not entitled to relief. John Doe's hiring of the Investigator Defendants was an act in furtherance of his First Amendment rights to free speech and to petition. As is his desire to remain anonymous while engaging in such protected conduct. John Doe therefore has a First Amendment privilege against discovery of documents leading to his identification, and Plaintiffs have failed to demonstrate that their need for the discovery outweighs his compelling First Amendment interests.

This Court should issue the writ.

Dated this 20th day of July, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to NRAP 28.2, I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type-style requirements of NRAP 32(a)(6) because the brief has been prepared in a proportionally spaced typeface (14-point Times New Roman font).

I further certify that this brief complies with the type-volume limitations of NRAP 21(d) because, excluding those portions of the brief that are exempted by NRAP 32(a)(7)(C), it contains 6,930 words.

I further certify that I have read this appellate brief , and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found.

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I understand that I may be subject to sanction in the event that this brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 20th day of July, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Armstrong Teasdale LLP and that on the 20th day of July, 2023, I served the foregoing document on the parties in this case by electronically filing via the Court's e-filing system, as follows:

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