IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 86559
District Court Case No. CV-22-02015

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; Vaughn Hartung
Real Parties in Interest.

SUPPLEMENT TO PETITIONER JOHN DOE'S APPENDIX

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CHRONOLOGICAL INDEX

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that I am an Employee of Armstrong Teasdale LLP and that on the 20th day of July 2023 the **SUPPLEMENT TO PETITIONER JOHN DOE'S APPENDIX VOL. 1 OF 1** was filed electronically with the clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the Master service list as follows:

The Honorable David A. Hardy SECOND JUDICIAL DISTRICT COURT DEPARTMENT NO. 15 75 Court Street Reno, Nevada 89501 Carrie.lipparelli@washoecourts.us *Respondent*	Ryan T. Gormley, Esq. Brittany M. Llewellyn, Esq. Jonathan J. Winn, Esq. WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC 6385 South Rainbow Blvd., Suite 400 Las Vegas, Nevada 89118 rgormley@wwhgd.com bllewellyn@wwhgd.com jwinn@wwhdg.com *Attorneys for Petitioners*
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/s/ Christie Rehfeld
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

HILLARY SCHIEVE, an individual, VAUGHN HARTUNG, an individual Plaintiffs, vs. DAVID MCNEELY, an individual, 5 ALPHA INDUSTRIES, LLC, a Nevada limited-liability company, and DOES 1 through X and ROES 1 through X, inclusive, Defendants.	Case No.: CV22-02015 Dept. No.:15

DEFENDANT JOHN DOE'S MOTION FOR PROTECTIVE ORDER

Defendant John Doe respectfully moves this Court for an order protecting against the disclosure of his true name and identity in this litigation. This Motion is supported by the attached memorandum of points and authorities, the attached certification of counsel, and the papers and pleadings on file in this matter.

POINTS AND AUTHORITIES

I. INTRODUCTION

Anonymous political conduct is deeply rooted in the American experience of liberty. In 1773, unidentified American colonists dumped chests of tea into Boston Harbor in a political protest. Their British overlords breathlessly huffed at the protest, outraged at the temerity of their nameless subjects.

In this case, Plaintiffs likewise huff breathlessly in outrage at the political conduct of John Doe.

What did John Doe do? He had the temerity to lawfully and anonymously engage a private investigator to investigate credible allegations of misconduct of Plaintiffs, his elected officials.

The Court should protect John Doe from discovery regarding his identity. First, the Court's order compelling disclosure of documents revealing John Doe's identity was to facilitate Plaintiffs' efforts to serve certain subpoenas on John Doe so that he could be brought into this matter as a defendant. The need for the subpoenas is now obviated, however, because John Doe has now appeared in this case through counsel and is willing to defend himself.

Second, John Doe has a First Amendment right to remain unnamed. The United States and Nevada constitutions protect the rights of citizens to engage in anonymous political conduct. Thus, the subpoenas seek information subject to First Amendment privilege. *See, e.g.*, *Perry v. Schwarzenegger*, 591 F.3d 1147, 1160 (9th Cir. 2010) ("A party who objects to a discovery request as an infringement of the party's First Amendment rights is in essence asserting a First Amendment *privilege*.") (citations omitted; emphasis in original).

A claim of First Amendment privilege is subject to a two-part framework. First, the party asserting the privilege "must demonstrate . . . a 'prima facie showing of arguable first amendment infringement.'" *Id*. (alteration in original; quotation omitted). If the proponent makes this showing, "the evidentiary burden shifts to the plaintiffs to demonstrate a sufficient need for the discovery to counterbalance that infringement." *Id.* at 1164. Importantly, Plaintiffs "must show that the information sought is ***highly relevant*** to the claims or defenses" in this matter, a more exacting standard than the general relevancy requirements of NRCP 26(b)(1).

John Doe can make a *prima facie* showing of First Amendment infringement, as discussed in detail below. Thus, the burden is on Plaintiffs to prove a sufficient need for the discovery that would outweigh John Doe's First Amendment interests. Given the narrow (and moot) purpose of the subpoenas—to bring John Doe into the litigation—Plaintiffs cannot meet their burden. Thus, the Court should quash the subpoenas. Further, in light of John Doe's First Amendment interest in maintaining his anonymity, the Court should issue an order protecting against public disclosure of John Doe's identity.

Alternatively, if the Court is not inclined to apply the two-part framework discussed in *Perry*,

the Court should nevertheless assess whether to issue an order protecting John Doe's anonymity under the two-part test articulated in *Highfields Capital Management, L.P. v. Doe*, 385 F.Supp.2d 969 (2005). Under the *Highfields* test, Plaintiffs bear the initial burden of persuading the Court "that there is a real evidentiary basis for believing that the defendant has engaged in harmful conduct that has caused real harm to the interests of the plaintiff that the laws plaintiffs has invoked were intended to protect." *Highfields*, 385 F.Supp.2d at 975. If Plaintiffs can make the required evidentiary showing with "*competent evidence*," the Court must then "assess and compare the magnitude of harms that would be caused to the competing interests by a ruling in favor of plaintiff[s] and by a ruling in favor of defendant." *Id*. (emphasis in original).

Plaintiffs cannot satisfy the *Highfields* test, either. As set forth in John Doe's May 5, 2023 Motion for Summary Judgment, Plaintiffs' causes of action fail as a matter of fact and law. Even if Plaintiffs could come forward with competent evidence, any harm or inconvenience Plaintiffs may experience litigating against a pseudonymous defendant cannot outweigh the constitutional harm John Doe would suffer if he not permitted to proceed pseudonymously in this matter.

Put simply, John Doe has the right to engage in anonymous political conduct, including defending himself in this Court under a pseudonym, and this Court should issue a protective order shielding John Doe's identity from disclosure.

II. PROCEDURAL HISTORY

1. In response to the issuance of certain subpoenas that sought "to identify the individual or entity that hired private investigator David McNeely and his company 5 Alpha Industries" for the purpose of serving the subpoenas on John Doe, the Discovery Commissioner recommended that the District Court grant Plaintiffs' Motion to Compel and deny Defendant David McNeely's Countermotion for Protective Order.
2. On May 4, 2023, this Court accepted the Discovery Commissioner's Recommendations, granting the Plaintiffs' Motion to Compel and compelling Defendant McNeely to disclose the identity of his employer by May 12, 2023 (the "Disclosure Order").
3. On May 5, 2023, John Doe filed his Answer and a Motion for Summary Judgment in this case.
4. On May 9, 2023, John Doe filed a Motion for Stay and Motion for Order Shortening Time

requesting that this Court stay the Disclosure Order pending either the entry of a stipulated protective order or the resolution of a motion for a protective over.

5. This Court entered an order on May 9, 2023 denying John Doe's Motion for Stay and Ex Parte Motion for Order Shortening Time.
6. John Doe filed a Renewed Motion for Stay on May 10, 2023.
7. Also on May 10, 2023, the Plaintiffs and Defendants David McNeely and 5 Alpha Industries LLC (the "Investigator Defendants") stipulated to stay the Disclosure Order so that the Investigator Defendants could file a writ petition with the Nevada Supreme Court.
8. Following the filing of the stipulation, this Court entered an order on May 10, 2023 denying John Doe's Renewed Motion for Stay and Ex Parte Motion for Order Shortening Time as Moot. The Court directed John Doe to submit a motion for a protective order by no later than May 24, 2023.
9. On May 12, 2023, the Investigator Defendants filed a Petition for Writ of Prohibition or Mandamus with the Nevada Supreme Court. *See* Nevada Supreme Court Case No. 86559.
10. On May 19, 2023, John Doe filed a Proposed Brief of *Amicus Curiae* in support of the Investigator Defendant's Petition for Writ of Prohibition or Mandamus.

III. ARGUMENT

NRCP 26(c)(1) permits the district court to issue an order to protect a party from "annoyance, embarrassment, oppression, or undue burden or expense…." For the reasons detailed below, the Court should issue a protective order to protect John Doe from this litigation unduly burdening his First Amendment right to anonymously engage in expressive political conduct.

A. Preliminarily, the Need to Discovery John Doe's Identity Has Been Obviated By John Doe's Appearance.

Plaintiffs sought discovery regarding John Doe's identity for the sole purpose of serving him with process. [*See, e.g.*, February 2, 2023 Motion to Compel, p. 6:13-15 ("[T]he scope of the Subpoena is purposefully limited to obtain only the information required to add a necessary party in this case.").] On May 5, 2023, John Doe answered. He is participating in this case, and counsel can accept service on his behalf. *Cf.* NRCP 5(b)(1) ("If a party is represented by an attorney, service under this rule must

be made on the attorney….").

Stated simply, now that John Doe has appeared, the purpose of and need for the Disclosure Order has been obviated.

B. John Doe's Conduct of Anonymously Hiring a Private Investigator to Investigate Elected Officials is Protected First Amendment Activity.

Assuming *arguendo* that the purpose of Plaintiffs' subpoenas was not obviated by John Doe's appearance and answer, the Court should still issue an order protecting his identity from disclosure because allowing Plaintiffs to unmask him would implicate much larger and much more troubling constitutional and policy implications. John Doe's anonymous hiring of the Investigator Defendants to research and dig up damaging information about Schieve and Hartung is part and parcel of the business of politics, and as such, it is conduct that is protected by the First Amendment.

1. The Use of Private Investigators to Conduct Political Research Is a Part of American Politics.

Plaintiffs assert that the surreptitious surveillance conducted by the Investigator Defendants "shock[s] the conscience." [Amended Complaint, ¶ 1.] For better or worse, however, the use of private investigators to conduct investigations of elected officials and/or candidates is just politics as usual.

Private investigation of elected officials and candidates for elected office has and likely will always be part of American politics. The late Sen. Edward Kennedy, for example, retained the services of a private investigator during his 1994 fight for reelection to dig up damaging information about challenger Mitt Romney's time as CEO of Bain Capital.[1] Quite recently, John McCann, a 2022 mayoral candidate in Chula Vista, California, hired a private investigator to determine whether his opponent lived within the city's limits.[2] And for a more historical example, early American journalist-turned-political-muckraker James T. Callendar is remembered today for reporting on Alexander Hamilton's affair with Maria Reynolds as part of a broader attack on Federalism, and for a series of

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[1] https://www.upi.com/Archives/1994/08/23/Kennedy-GOP-rival-used-same-detectives/6282777614400/ (last accessed May 19, 2023).

[2] https://www.sandiegouniontribune.com/communities/south-county/story/2022-09-27/chula-vista-mayoral-candidate-mccann-hired-private-investigator-to-look-into-campa-najjars-residency ("Trackers, where individuals are recorded or followed, have also been among some of the most popular ways campaigns conduct their research.") (last accessed May 19, 2023).

articles revealing that Thomas Jefferson had fathered children with Sally Hemings.[3]

And this sort of political activity is not without precedent in Nevada. The most notable example in Nevada history of private investigation of an elected official leading to the discovery of information of public interest is the case of disgraced Clark County Commissioner Lynette Boggs-McDonald. In 2006, Boggs-McDonald was running for re-election. Two local organizations—the Culinary Union and the Las Vegas Police Protective Association—hired a private investigator who surveilled the movements of Boggs-McDonald and her children for six weeks and determined that her legal residence was outside of her commission district. This violated Nevada law. [*See* **Exhibit C** to John Doe's May 10, 2023 Renewed Motion for Stay.] As a result of the private investigator's detailed surveillance, the public learned about Boggs-McDonald's criminal conduct—as did the Clark County District Attorney, who subsequently indicted Boggs-McDonald. She was not re-elected, and eventually pleaded guilty to a gross misdemeanor.[4]

2. Anonymous Political Action is Protected By the First Amendment.

Anonymous participation in political discourse is a venerable and important American tradition that predates even the ratification of the First Amendment. "Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all.... Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes." *Talley v. California*, 362 U.S. 60, 64–65 (1960).

The United States Supreme Court has repeatedly affirmed that the First Amendment protects anonymous political activity. *N.A.A.C.P. v. Alabama ex rel Patterson*, 357 U.S. 449, 462 (1958) ("[C]ompelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action"); *Talley v. California*,

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[3] https://www.monticello.org/research-education/thomas-jefferson-encyclopedia/james-callender/ (last accessed May 19, 2023).

[4] *See* https://lasvegassun.com/news/2009/jan/13/deal-willlet-boggs-avoid-trial-probably-jail/ (last accessed May 19, 2023). John Doe asks the Court to take judicial notice of the facts of the Boggs-McDonald affair pursuant to NRS 47.130.

362 U.S. 60 (1960) (holding that a Los Angeles ordinance requiring that all handbills identify the person who published or distributed them was overbroad and in violation of the First Amendment freedoms of speech and press); *McIntyre v. Ohio Elections Comm'*n, 514 U.S. 334 (1995) (holding that an Ohio statute prohibiting anonymous campaign literature violated the Free Speech Clause of the First Amendment); *Hynes v. Mayor and Council of Borough of Oradell*, 425 U.S. 610, 624-25 (1976) (Brennan, J., concurring in part) ("It can hardly be denied that an ordinance requiring the door-to-door campaigner to identify himself discourages free speech.")

In *McIntyre*, the Supreme Court explained that there are two distinct reasons why forbidding anonymous political speech is a serious intrusion on First Amendment values. First, "[t]he decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible." *McIntyre*, 514 at 342. Second, "an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity. Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent. Thus, even in the field of political rhetoric, . . . the most effective advocates have sometimes opted for anonymity." *Id.* at 342-43 (citation omitted).

The Ninth Circuit has consistently followed this precedent, recognizing that "[d]epriving individuals of this anonymity is . . . 'a broad intrusion, discouraging truthful, accurate speech by those unwilling to [disclose their identities] and applying regardless of the character or strength of an individual's interest in anonymity.'" *Washington Initiatives Now v. Rippie*, 213 F.3d 1132, 1137–38 (9th Cir. 2000) (quoting *Am. Const. L. Found., Inc. v. Meyer*, 120 F.3d 1092, 1103 (10th Cir. 1997)); *see also AFL–CIO v. FEC*, 333 F.3d 168, 175 (D.C. Cir. 2003) ("The Supreme Court has long recognized that compelled disclosure of political affiliations and activities can impose just as substantial a burden on First Amendment rights as can direct regulation."); *Am. C.L. Union of Nevada v. Heller*, 378 F.3d 979 (9th Cir. 2004) (holding that a Nevada statute requiring certain groups or entities publishing material or information relating to an election candidate or any question on a ballot to reveal the names and addresses of the publication's sponsors on the publication was overbroad and facially unconstitutional).

In sum, the First Amendment protects John Doe's right to anonymously investigate elected officials. The subpoenas here would undeniably infringe upon that right. Moreover, permitting discovery into John Doe's identity would chill his First Amendment activities. John Doe has an interest in determining whether elected officials are engaged in misconduct, an issue that is of public concern. Thus, when John Doe received information about alleged misconduct by Schieve and Hartung, he wanted to determine whether that information was accurate. [*See* John Doe Decl. in Support of Motion for Summary Judgment, ¶ 8.] The Investigator Defendants' guarantee of confidentiality was crucial to his decision to retain their services; but for that guarantee, he would not have hired them to investigate the information he received about alleged misconduct. [*Id*. at ¶¶ 10-11.] Discovery regarding John Doe's identity would infringe upon his First Amendment right to anonymously engage in political activity.

C. Plaintiffs Do Not Have a Sufficient Need for John Doe's Identifying Information That Would Justify the Infringement on His First Amendment Rights.

Because John Doe has made a *prima facie* showing that the subpoenas infringe on his rights under the First Amendment, the question is whether Schieve and Hartung can demonstrate a sufficient need—under the heightened relevance standard—to counterbalance that infringement. *Perry*, 591 F.3d at 1164.[5] The answer to that question is a resounding no. Moreover, the subpoenas are not necessary to achieve Schieve and Hartung's goal of bringing John Doe into the litigation because that has now occurred.

1. John Doe's Identity Is Not "Highly Relevant" to the Claims and Defenses.

As outlined in the Petition, there are eight causes of action at issue in the litigation: (1) invasion of privacy – intrusion upon seclusion; (2) invasion of privacy – public disclosure of private facts; (3) violation of NRS Chapter 200, anti-doxxing; (4) negligence; (5) trespass; (6) civil conspiracy; (7) aiding and abetting; and (8) declaratory relief. [*See generally* Amended Complaint.] Information

[5] Typically, courts have considered the First Amendment privilege in the context of either an associational freedom claim, *see, e.g.*, *NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449 (1958), or in cases regarding efforts to obtain confidential sources from a journalist. *See, e.g.*, *Newton v. Nat'l Broad. Co.*, 109 F.R.D. 522 (D. Nev. 1985). But the two-part framework explored in those cases is equally applicable here.

regarding John Doe's identity is not relevant to any of these claims, much less "highly relevant" as is required by *Perry*.

And importantly, the subpoenas ***are not intended to discover evidence relevant to Schieve and Hartung's claims***. Rather, the entire purpose of the subpoenas was to "add a necessary party in this case," John Doe. [1 PA65; *see also* 1 PA11 (stating that "each subpoena seeks only one limited category of documents for the sole purpose of identifying the unknown defendant").] Accordingly, Schieve and Hartung's own representations demonstrate John Doe's identity is not actually relevant to any of the claims and defenses, much less "highly relevant" such that there would be a compelling justification for infringing on John Doe's First Amendment rights.

2. The Need for the Subpoenas Has Been Obviated by John Doe's Participation in the Litigation.

Schieve and Hartung got what they wanted, and it did not require infringing on John Doe's First Amendment rights. John Doe has appeared in the district court case and is represented by counsel. He is now a part of the litigation. Discovery regarding John Doe's legal identity now serves no real purpose at all—except to interfere with John Doe's right to anonymously engage in political activity.

D. <u>The Harm to John Doe's First Amendment Right to Engage in Political Activity Outweighs Any Interest Plaintiffs Have in Uncovering His Identity.</u>

As discussed in detail above, John Doe's political activity and interest in remaining anonymous while engaging in such activity are rooted in the First Amendment. As such, discovery aimed at uncovering his identity impermissibly infringes on his constitutional right to anonymous political activity. To the extent the Court believes that the two-part framework discussed in *Perry* above applies solely to associational freedom claims, the Court should 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 H*ighfields*, 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 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 "that there is 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.

1. Plaintiffs Fail Prong 1 of the Highfields Test.

Plaintiffs here cannot get past the first prong of the Highfields Test for all the reasons set forth in John Doe's Motion for Summary Judgment, which is incorporated in this Motion by reference. Put simply, Plaintiffs have no evidence that John Doe acted tortiously.

2. Plaintiffs Fail Prong 2 of the Highfields Test.

As discussed above, if Plaintiffs produce competent evidence addressing all the inferences of fact they would need to prove to prevail on their claims, the Court must next weigh the harms that John Doe would suffer if the Investigator Defendants are required to comply with the subpoena against the harms Plaintiffs would suffer if the Court Even if Plaintiffs could adduce evidence "support a finding of *each* fact that is essential to a given cause of action," *Highfields*, 385 F.Supp.2d at 976, the constitutional harm John Doe would suffer if the subpoenas were enforced heavily outweighs any

harms Plaintiffs might experience.

In fact, Plaintiffs suffer no harm by permitting John Doe to proceed pseudonymously because John Doe's identity is not relevant to Plaintiffs' causes of actions. By contrast, disclosure irreparably harms John Doe. This is true for two obvious reasons.

First, as discussed above, the entire objective of Plaintiffs' subpoenas and their motion to compel is now moot because John Doe has appeared and answered. Thus, John Doe's continued anonymity does not harm Plaintiffs in the slightest.

Second, and most critically, John Doe's First Amendment interest in anonymously engaging in political activity would be irreparably harmed were Plaintiffs to use legal process to obtain his identity.

Courts have repeatedly held that civil subpoenas seeking information regarding anonymous individuals raise First Amendment concerns. As referenced above, in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958), the Supreme Court held that a discovery order requiring the NAACP to disclose its membership list interfered with the First Amendment's freedom of assembly. Similarly, in *NLRB v. Midland Daily News*, 151 F.3d 472, 475 (6th Cir.1998), the Sixth Circuit declined on First Amendment grounds to enforce a subpoena duces tecum issued by the National Labor Relations Board seeking to require a newspaper publisher to disclose the identity of an anonymous advertiser. And in the *Highfields* matter itself, the court ultimately granted the anonymous Doe defendant's motion to quash because "enforcing a subpoena in this kind of setting poses a real threat to chill protected comment on matters of interest to the public." *Highfields*, 385 F.Supp.2d at 980.

Similarly here, enforcing the subpoenas would have a profound chilling effect on protected First Amendment activity. Were the Court to force the disclosure of John Doe's identity, it would effectively chill John Doe and any other similarly situated individual who has an interest in investigating and informing the public about the actions of the people they voted into office.[6]

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[6] Furthermore, Plaintiffs' claims and their efforts to unmask John Doe have broader implications for the ability of individuals and entities to conduct legitimate investigations such as the ones at issue in this matter, and the public's ability to benefit from such investigations. As an example, in personal injury cases, insurance companies routinely conduct "sub rosa" investigations (i.e., investigations that are conducted in secret) to determine whether a person is exaggerating or fabricating alleged injuries.

IV. CONCLUSION

John Doe enjoys the right to engage in anonymous political conduct. Regardless of whether the Court assesses this matter through the lens of the test set out in *Perry v. Schwarzenegger* or the test in *Highfields Capital Management, LP v. Doe*, the legal outcome must be the same: the Court must issue an order protecting John Doe's identity from discovery. Anything less would chill and irreparably damage John Doe's right to anonymously engage in political conduct.

Respectfully submitted this 24th day of May 2023.

DATED: May 24, 2023.

ARMSTRONG TEASDALE LLP

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NRCP 26(c)(1) CERTIFICATION

Pursuant to NRCP 26(c)(1), the undersigned certifies that while this Court's May 10, 2023 Order requires that John Doe submit a motion for a protective order by May 24, 2023, she has in good faith conferred or attempted to confer with the other affected parties in an effort to resolve this dispute without court action by taking the following actions:

1. On Friday, May 5, 2023, I emailed counsel for Plaintiffs to request that we meet and confer either that day or Monday, May 8, 2023 to discuss a protective order for the Court's May 4, 2023 Order compelling the Investigator Defendants to comply with the subpoenas for documents revealing John Doe's identity.

These sorts of investigations are critical to preventing insurance fraud and reducing insurance costs. Imagine, however, that every time an insurance company retains a private investigator to conduct sub rosa surveillance of a claimant, that claimant files suit alleging invasion of privacy, stalking, and other claims like Plaintiffs have here. This would strongly deter any reasonable insurance company from investigating potential fraud, and lead to increased costs that would be passed on to consumers.

2. On Wednesday, May 10, 2023, I participated in a conference with counsel for Plaintiffs, counsel for the Investigator Defendants and my co-counsel Jeffrey F. Barr. During that conference, we discussed whether Plaintiffs' counsel was willing to stipulate to a protective order shielding John Doe's identity.

3. Mr. Barr and I suggested some potential measures for protecting John Doe's identity, including a protective order with an Attorney's Eyes Only provision.

4. The parties discussed the matter in good faith, but ultimately counsel for Plaintiffs stated he was not willing to stipulate to a protective order.

DATED: May 24, 2023.

ARMSTRONG TEASDALE LLP

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AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the Social Security Number of any person.

DATED: May 24, 2023.

ARMSTRONG TEASDALE LLP

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Armstrong Teasdale LLP and that on May 24, 2023, I electronically filed the foregoing with the Clerk of the Court by using the e-flex filing system which served all parties of record electronically.

/s/Allie Villarreal
An Employee of Armstrong Teasdale LLP

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Counsel for Plaintiffs

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

HILLARY SCHIEVE, an individual, VAUGHN HARTUNG, an individual,

Plaintiffs,

v.

DAVID MCNEELY, an individual, 5 ALPHA INDUSTRIES, LLC, a Nevada limited-liability company, and DOES 1 through X and ROES 1 through X, inclusive,

Defendants.
_____/

Case No.: CV22-02015

Dept. No.: 15

PLAINTIFFS' OPPOSITION TO DEFENDANT JOHN DOE'S MOTION FOR PROTECTIVE ORDER

Plaintiffs Hillary Schieve ("Schieve") and Vaughn Hartung ("Hartung") (collectively "Plaintiffs"), by and through their counsel of record, submit this Opposition to Defendants' Motion for Protective Order (the "Motion"). This Opposition is based upon the following memorandum of points and authorities, the papers and pleadings on file herein, and any oral argument entertained by the Court.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

John Doe cites to the Boston Tea Party as historical precedent for lawful, anonymous political conduct, but the January 6 Attack on the Capitol is a more apt analogy. After that "political protest," over 950 defendants were arrested, 484 defendants pleaded guilty, and 40 more defendants were found guilty after trial.[1] These individuals were charged not because of their political protest, but because they committed separate criminal acts that were not protected by the First Amendment under blackletter law. A First Amendment defense was raised in the January 6 cases, albeit in the criminal context, and was squarely rejected. *United States v. Nordean*, 579 F. Supp. 3d 28, 53 (D.D.C. 2021) ("And more specifically, they are charged with conduct involving acts of trespass, depredation of property, and interference with law enforcement, all intended to obstruct Congress's performance of its constitutional duties. No matter Defendants' political motivations or any political message they wished to express, this alleged conduct is simply not protected by the First Amendment.").

Here, the tortfeasor and co-conspirator, "John Doe," asks for an extraordinary remedy – to keep his identity secret from Plaintiffs, the media, the public, and even from this Court. Mot. 1. There is no precedent for this request. Throughout John Doe's entire Motion, there is not a single authority where a party was permitted to litigate in such a fashion. The cases therein primarily discuss whether a party can proceed using a pseudonym to keep their identity secret from the public and the media. That is not a request made by John Doe and it should not be granted as a partial compromise. The request here is to vitiate Plaintiffs' due process rights entirely by preventing them from deposing John Doe, from cross-checking his testimony, or from engaging in any discovery that would involve knowledge of his identity.

John Doe asserts that he has a First Amendment right to remain unnamed. Mot. 2. This is simply not accurate. Although there are situations where the First Amendment protections can

[1] 24 Months Since the January 6 Attack on the Capitol, https://www.justice.gov/usao-dc/24-months-january-6-attack-capitol

block disclosure, these are almost invariably in the context of defamation cases by anonymous internet speakers. *Highfields Cap. Mgmt., L.P. v. Doe*, 385 F. Supp. 2d 969, 974 (N.D. Cal. 2005). Here, John Doe, together with the McNeely Defendants caused a GPS tracking device to be installed on Plaintiffs' vehicles. The First Amendment would not allow John Doe's identity to be concealed if he had ordered a private investigator to break into Plaintiffs' homes, and it does not allow him to remain anonymous for trespassing on Plaintiffs' vehicles. Accordingly, the Motion should be denied in its entirety.

II. LEGAL STANDARD

"Discovery matters are within the district court's sound discretion." *Club Vista Fin. Servs., LLC v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228-29, 276 P.3d 246, 249 (2012). Parties are entitled to obtain "discovery regarding any nonprivileged matter that is relevant to any party's claims or defenses and proportional to the needs of the case . . ." NRCP 26(b)(1).

NRCP 26(c)(1) allows a "party or any person from whom discovery is sought may move for a protective order in the court where the action is pending" and the court may "for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . ."

III. ARGUMENT

A. The Motion for Protective Order is Untimely.

Nevada provides a remedy to parties whose personal information is sought in discovery. NRCP 45(c)(2)(B) allows a "person claiming a proprietary interest in the subpoenaed documents, information, tangible things, or premises to be inspected, may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials . . ." However, such an objection "must serve it before the earlier of the time specified for compliance or 14 days after the subpoena is served." *Id.* On January 25, 2023, the McNeely Defendants timely objected to the Subpoenas seeking the identity of John Doe. Mot. to Compel 3.

John Doe was not served with the Subpoenas, but he cannot contend that he was unaware of them. This exact question was posed to John Doe's counsel: "When was your client first aware

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of the subpoena?" John Doe's Motion for Stay May 9, 2023. In his own filing, John Doe concedes that "John Doe's counsel did not answer these questions." *Id.* Appearing in this case one day after the Court overruled the McNeely Defendants' objections and ordered the disclosure of John Doe's identity is all the proof needed that John Doe was well aware of these proceedings and had the opportunity to object to the subpoena. By failing to timely object to the Subpoenas by February 6, 2023 and instead delaying until May 24, 2023, John Doe's objections to the Subpoenas and thus to the disclosure of his identity were forever waived.

B. The Need for Discovery is Not Moot.

John Doe argues that his participation in this case moots the need for discovery. Mot. 4-5. Not so. As set forth in the separate Motion to Strike, John Doe is not a legitimate party in this lawsuit and his rogue filings should be stricken. Moreover, the Subpoenas were not just served to add "John Doe" to the case, but clearly to begin to prosecute the case against this party in a full and fair manner. It is not enough to have an unidentified defendant in this case who cannot be deposed, John Doe must be named and must be subject to full discovery. Plaintiffs can have no confidence that John Doe did what he says he did without further verification.

C. Plaintiffs Readily Admit that There is No Bar Against the Use of Private Investigators in Politics, but There is Against Unlawful Conduct.

John Doe advances a strawman argument that there is some sort of right to use a private investigator for political purposes. Mot. 5-6. He argues that unmasking his identity would "effectively chill John Doe and any other similarly situated individual who has an interest in investigating and informing the public about the actions of the people they voted into office." Mot. 11. Plaintiffs do not challenge the ability of a party to employ a private investigator to lawfully investigate a politician or for any other purpose. But a private investigator cannot break into a house to obtain information and he cannot surreptitiously install a GPS tracking device on a private vehicle. The latter is expressly criminal in over twenty-five states, and likely soon be in Nevada,[2]

[2] *Nevada bill banning GPS tracking devices on cars get bipartisan support in legislature,* https://mynews4.com/news/local/nevada-bill-banning-gps-tracking-devices-on-cars-gets-bipartisan-support-in-legislature-mayor-hillary-schieve.

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and this Court has already found that Plaintiffs have "satisfied the notice-pleading standards to state a claim for" an invasion of privacy. Order, May 4, 2023, 5. But John Doe's Motion does not ask for a determination about substantive liability, but about whether the private investigator and the client can remain anonymous. For this purpose, John Doe should have reviewed his citations more carefully.

First, John Doe cites Sen. Kennedy's investigation of Sen. Romney but the included source identifies both the client, Sen. Kennedy, and the investigator, Investigative Group, Inc. Mot. 5. Second, John Doe cites to investigation by a mayoral candidate in 2022, but again the source identifies the client, John McCann, and the investigator, Lawrence Hamilton. Mot. 5. Third, John Doe identifies both the client and investigator, James T. Callendar, who was a muckraking journalist (and incidentally was prosecuted under the Sedition Act). Mot. 6. Fourth, John Doe references the investigation of Clark County Commissioner Lynette Boggs-McDonald. Mot. 6. In that case, both the clients – the Culinary Union and the Las Vegas Police Protective Association - and the investigator, private detective David Groover, were matters of public record. "*More trouble on horizon for Boggs?*", Las Vegas Sun, June 6, 2007.

John Doe went 0 for 4. He is not the only person who has used a private investigator for political purposes, but based on his own authority appears to be the only one who lacks the courage to identify himself.

D. There is No Legal Basis to Permit John Doe to Conceal His Identity.

"Firmly embedded in the American judicial system is a presumption of openness in judicial proceedings." *Doe No. 1 v. Wynn Resorts Ltd*., No. 219CV01904GMNVCF, 2022 WL 3214651, at *3 (D. Nev. Aug. 9, 2022) (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569-574, 100 S. Ct. 2814 (1980)). NRCP 10(a) requires pleadings to "name all the parties" and NRCP 10(d) permits the use of fictitious names for defendants but requires that when the true name is discovered, the "pleader should promptly substitute the actual defendant for a fictitious party."

There is a "default preference for openness" and parties are only allowed 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." *Wynn Resorts Ltd*.,

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2022 WL 3214651, at *3 (quotations omitted). When a request for anonymity is made, a district court must balance the "need for anonymity against the general presumption that parties' identities are public information and the risk of unfairness to the opposing party." *Id.* (quotations omitted). Courts permit plaintiffs to use pseudonyms in three situations: "(1) when identification creates a risk of retaliatory physical or mental harm; (2) when anonymity is necessary to preserve privacy in a matter of sensitive and highly personal nature; and (3) when the anonymous party is compelled to admit [his or her] intention to engage in illegal conduct, thereby risking criminal prosecution." *Id.* (quotations omitted).

John Doe does not argue that he faces any risk of retaliatory physical or mental harm and he does not argue that he risks criminal prosecution. John Doe, at most, alleges that he has some interest in anonymous political speech. Mot. 11. This does not qualify as "sensitive and highly personal" but for the purpose of this legal framework, John Doe's arguments will be considered as part of this prong. What is especially frustrating though is that filing this Motion anonymously, John Doe prevents the discovery of evidence that entirely negates his current position. For example, what if John Doe is a prominent individual who frequently publishes his political speech for general consumption? At that point, what interest in privacy or anonymity would John Doe seriously have? There could be any number of similar situations, including through discovery about who was already aware that John Doe had hired the McNeely Defendants.

While minors, victims of sexual assault and harassment, and other protected classes facing discrimination have been permitted to proceed anonymously, these are the exceptions rather than the rule. Even in cases of sexual harassment, courts have rejected attempts by parties to proceed anonymously. *Wynn Resorts Ltd*., 2022 WL 3214651, at *10. The court in *Wynn Resorts* eloquently stated:

> *"Allowing plaintiffs in general to proceed anonymously against famous perpetrators in sexual harassment cases based on the perpetrator's identity, will also lower the public's confidence in the courts. Considering the acts of the perpetrator, in contrast to similarly situated sexual harassment plaintiffs, serves the public interests of treating like cases alike and protecting open courts. The plaintiffs' fear of harassment, injury, ridicule or personal embarrassment in this case are equally present for all similarly*

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> *situated sexual harassment victims and is not extraordinary. The plaintiffs' interest in remaining anonymous is greatly outweighed by the prejudice to the public. The plaintiffs have not met their burden regarding the factors in the second situation.*

2022 3214651, at *9 (D. Nev. Aug. 9, 2022). John Doe may have a desire or a preference to remain anonymous, but this is not sufficient given the "prejudice to the public." *Id.*

1. Regardless of the Legal Test, John Doe Does Not Establish a First Amendment Interest.

Nevada has not selected a standard to apply to John Doe's Motion and neither have many other courts. *In re Anonymous Online Speakers*, 661 F.3d 1168, 1175 (9th Cir. 2011) ("The many federal district and state courts that have dealt with this issue have employed a variety of standards to benchmark whether an anonymous speaker's identity should be revealed."). Regardless of which test is selected, John Doe cannot satisfy it because he has no First Amendment interest and Plaintiffs' needs would outweigh that interest in any event.

First, *Perry v. Schwarzenegger*, 591 F.3d 1147, 1157 (9th Cir. 2010) involved a party in a same-sex marriage suit in California trying to obtain internal campaign communications relating to the campaign strategy and advertising of the proponents of a ballot proposition. *Perry* did not involve anonymous speakers and rested on the importance of political association and political expression. *See In re Anonymous Online Speakers*, 661 F.3d 1168, 1174 (9th Cir. 2011). But it did articulate a test where John Doe would have to make a "prima facie case of arguable First Amendment infringement" and then Plaintiffs would have to "demonstrate a sufficient need for the discovery to counterbalance that infringement." *Perry*, 591 F.3d at 1157.

Highfields Cap. Mgmt., L.P. v. Doe, 385 F. Supp. 2d 969, 979 (N.D. Cal. 2005) involved a defamation claim with "essentially no chance that these messages would be attributed to Highfields Capital Management L.P., or that they would sully its reputation in any quarter that might matter to it." In the *Highfields* test, a party seeking to discover the identity of an anonymous speaker must first persuade the court that there is 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 and then second, if the plaintiff makes this showing, the court must then assess and

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compare the magnitude of the harms that would be caused to competing interests by ordering that the defendant's identity be disclosed. *Id.*

Under either test John Doe does not establish a First Amendment interest. It should be easier for an anonymous defendant, who is currently not subject to discovery, or the penalties of perjury, to maintain a coherent story. Even in the early days, John Doe has fallen at this hurdle and has advanced entirely inconsistent positions. To support his Motion for Summary Judgment, John Doe argued that "I did not ask or authorize Mr. McNeely and/or 5 Alpha Industries to place a tracking device on Mayor Schieve's vehicle, nor did I ask or authorize them to place a tracking device on Mr. Hartung's vehicle" and that "I also have never had access to any of the tracking information Mr. McNeeely and/or 5 Alpha Industries obtained." Mot. for Summary Judgment, Doe Decl. ¶¶ 12-13. If John Doe did not engage in these activities, then what anonymous speech is he attempting to protect? Unlike any of the anonymous speakers on the internet, John Doe does not admit to making any comments, any publications, or engaging in any First Amendment activity. That he might have intended to ultimately publish some other information is irrelevant as he is specifically denying that he authorized the collection of tracking data. Unlike the defamation cases, this case simply does not turn on the issue of speech or its protections.

In any event, Plaintiffs have already established an evidentiary basis to believe that the John Doe Defendant engaged in wrongful conduct. This was established throughout the Motion to Dismiss briefing and confirmed in John Doe's declaration that he hired the McNeely Defendants. Further, McNeely declared that he was hired by a client to investigate Plaintiff Schieve. Opp. Feb. 16, 2023, Ex. 1. Nothing further is required to advance the case.

When confronted with this balancing test, courts have had no qualms about compelling disclosure. *Wirt v. Twitter, Inc.*, No. 21-MC-80166-JSC, 2021 WL 5919846, at *3 (N.D. Cal. Dec. 15, 2021) ("On balance, the competing harms favor disclosure. Given the nature of the challenged speech, @Deus_Abscondis's central role in the alleged events, and Dr. Wirt's interest in redressing allegedly defamatory accusations against him, @Deus_Abscondis's right to engage in anonymous speech "give[s] way" to Dr. Wirt's "need to discover the speaker's identity in order to pursue [his]

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claim.") Similarly, Plaintiffs need John Doe's identity to pursue their claims and complete discovery and any minimal First Amendment claim fades away in comparison.

2. The Investigation May Be Required to be Public Under Campaign Finance Laws.

To the extent that John Doe was acting for political reasons, there is a very strong possibility that he was required to disclose the payment to the McNeely Defendants as a campaign contribution. If he was acting on behalf of a political action committee or on behalf of an opposing candidate, then this campaign contribution could be considered an in-kind contribution requiring disclosure. *See* https://www.fec.gov/resources/cms-content/documents/2019-10-ELW-the-law-of-a-thing-of-value.pdf.

3. The Identity of John Doe is Highly Relevant.

Obviously the identity of a defendant is relevant in this case. This is beyond cavil. Plaintiffs need more than that a "client" hired the McNeely Defendants as they still may need to seek a protective order depending on the identity and motivations of this "client." *See, e.g., Farmland Partners Inc. v. Fortunae,* No. 18-CV-02351-KLM, 2020 WL 12575073, at *5 (D. Colo. May 18, 2020) ("The Court finds that Rota's identity and the identity of others allegedly involved in the "short and distort" scheme . . . are clearly relevant to FPI's claims . . . Absent the ability to identify the alleged malefactors, [the plaintiff] is left with no ability to vindicate its rights, and legal process is rendered meaningless."). As set forth in the Opposition to the Motion for Summary Judgment, incorporated herein, there are numerous reasons that Plaintiffs require discovery not just of the identity of John Doe but about his actions, associates, and communications.

4. John Doe Cannot Demonstrate Anything to the Court Because He Is Not a Proper Party.

"Absent extraordinary circumstances, witnesses do not testify anonymously under our system of laws." *Diamond Pleasanton Enter., Inc. v. City of Pleasanton*, No. 12-CV-00254-WHO, 2015 WL 74946, at *1 (N.D. Cal. Jan. 5, 2015); *see also Doe v. Vill. of Deerfield*, 819 F.3d 372, 376–77 (7th Cir. 2016) ("We have repeatedly voiced our disfavor of parties proceeding anonymously, as anonymous litigation runs contrary to the rights of the public to have open

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judicial proceedings and to know who is using court facilities and procedures funded by public taxes.").

Accordingly, this Court cannot find that John Doe has a compelling interest in his privacy because the Court has no competent evidence on which to base that determination. The John Doe Defendant has not established any right or standing to participate in this lawsuit or to resist discovery.

IV. CONCLUSION

For all of the foregoing reasons, this Court should deny the John Doe Defendant's Motion for Protective Order.

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that this document does not contain the social security number of any person.

DATED: June 7, 2023

McDONALD CARANO LLP

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of McDONALD CARANO LLP and that on June 7, 2023, I electronically filed the foregoing with the Clerk of the Court by using the e-flex filing system which served all parties of record electronically:

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

HILLARY SCHIEVE, an individual, VAUGHN HARTUNG, an individual Plaintiffs, vs. DAVID MCNEELY, an individual, 5 ALPHA INDUSTRIES, LLC, a Nevada limited-liability company, and DOES 1 through X and ROES 1 through X, inclusive, Defendants.	Case No.: CV22-02015 Dept. No.:15

DEFENDANT JOHN DOE'S REPLY

IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

Defendant John Doe hereby submits this Reply in support of his motion for an order protecting against the disclosure of his true name and identity in this litigation ("the Motion"). This Reply is supported by the attached memorandum of points and authorities, the papers and pleadings on file in this matter, and any argument permitted by the Court.

POINTS AND AUTHORITIES

I. INTRODUCTION

This is a matter of a citizen employing common, lawful efforts to hold elected officials accountable. John Doe hired a private investigator to investigate Plaintiffs, his elected officials. John This is merely political activity within the confines of John Doe's First Amendment rights. Plaintiffs,

however, ignore this fact. Moreover, Plaintiffs do not even attempt to proffer any evidence of wrongdoing--no documents, no declaration, nothing.

As elected officials, Plaintiffs enjoy an office that gives significant political power and influence. It is undisputed that John Doe's motives in investigating Schieve, and his hiring of a private investigator investigate them, were political. Such political investigations of government officials is protected by the First Amendment, as is the right to engage in such conduct anonymously. At times, anonymity is of paramount importance in such endeavors to avoid acts of political- or government-driven retribution. As explained in the Motion and below, such is the case here.

Plaintiffs bring particular claims in this action, each of which rely on allegations of particular alleged conduct to support particular theories of liability. John Doe's identity is relevant (let alone, highly relevant) to none of those theories. Plaintiffs do not even attempt to argue otherwise, resorting instead to vague assertions that they may need that information for unspecified legal maneuvers later. Therefore, Plaintiffs remain devoid of any legally legitimate need to discover John Doe's identity. Accordingly, the Court should grant John Doe a protective order that precludes Plaintiffs from unmasking him.

II. STATEMENT OF ADDITIONAL RELEVANT FACTS

John Doe relies on and incorporates here by reference the Statement of Facts and Procedural history discussed in Motion. *See* Mot. at 3:19–4:16. In addition to those facts, the following additional facts that were known to Plaintiffs at the time they filed suit are relevant to the *Highfields* test and the Court's assessment of Plaintiffs' alleged need to deprive John Doe of his First Amendment right to anonymously engaged in political conduct:

1. After determining Defendant David McNeely had purchased the GPS device discovered on Plaintiff Schieve's vehicle, the Sparks Police Department spoke to McNeely. *See* Police Report (P000001-000006).[1]
2. During that interview by Sparks Police, McNeely stated that (*see* P000004):

[1] The Police Report was produced by Plaintiffs in discovery. *See Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 776 (9th Cir. 2002) (evidence produced by a party opponent need not be authenticated).

a. He has been a private investigator since 2015 and is certified as a private investigator through the State of Nevada;

b. He "uses a wide range of methods in his investigations as long as they are within the confines of the law;"

c. He said, "there is no threat to the Mayor," and that "the intent behind the investigation was not to cause harm to anyone;"

d. The "motive behind the investigation was political;" and

e. The "extent of the investigation was utilizing the electronic tracker to look at 'possible areas' where SCHIEVE was alleged to have been frequenting."

3. Schieve also had personal knowledge of the following information that was relayed to her by Sparks Police Department detectives during a November 17, 2022 interview (*see* P000005):

a. That "no criminal element had been established with the use of the tracker;"

b. That an investigator "was hired to investigate an allegation" that the investigation determined was unfounded;

c. That "the use of the tracker was not illegal for a private citizen," and that "the laws in Nevada do not prohibit a private citizen (or in this case, a private investigator) from using electronic tracking devices; and

d. That the investigation "was solely electronic tracking and no other methods were used according to MCNEELY."

III. ARGUMENT

A. The Motion is Timely, as It Complied with the Court's Express Deadline.

Plaintiffs' assertion that the request for a protective order is untimely completely ignores that the Court explicitly ordered the request to be filed when John Doe filed it—by May 24, 2023. *See* [May 10, 2023 Order, p. 4:12–17]; Mot. at p.1 (filed May 24, 2023). In that Order, the Court expressly stated that "Defendant John Doe waives his ability to seek **protection if he fails to file a motion on or before May 24, 2023**." [Id. p. 4:16-17] (emphasis added). Given that order, default timing in Rule 45 in inapposite, and the Motion is timely.

B. Discovery Into John Doe's Identity Is Moot

Discovery of John Doe's identity remains moot. The goal of the subpoenas was—by Plaintiffs' own reckoning—narrowly focused on bringing John Doe into the litigation. Doe is now participating. Plaintiffs need no "further verification" [Opp., p. 4:14-15] of John Doe's declaration when it is in lockstep with the information Plaintiffs already have from the Sparks Police Department reports about McNeely's statements and Sparks PD's own investigation.

In addition, Plaintiffs still have not sufficiently articulated why John Doe cannot be deposed – certainly, it will add some layers of procedure, but John Doe can be deposed while still preserving anonymity (to the extent that he is even properly a defendant). Put simply, the need to discovery John Doe's identity is now moot with his appearance in the case.

C. John Doe Did Nothing Unlawful.

All John Doe did was to hire a private investigation. This is not illegal, or even tortious. Plaintiffs' errant central argument relies on the idea that John Doe has engaged in unlawful conduct, yet Plaintiffs admit that nothing John Doe, McNeely, and/or 5 Alpha Industries did was illegal. *See* Opp. at 4:17–5:18 ("[A] private investigator . . cannot surreptitiously install a GPS tracking device on a private vehicle. Th[is] is expressly criminal in over twenty-five states, **and likely soon be in Nevada**") (emphasis added). In other words, notwithstanding what may be prohibited in other states, tracking a public official's vehicle on public roads was not illegal in Nevada at any relevant time, nor is it currently.[2] *See also Quinn v. Thomas*, 2010 WL 3036828 (D. Nev. Jul. 28, 2010) (holding that surveillance "on activities of the [p]laintiff which could have been seen or heard by any passerby" did not offend the complainant's privacy interests).

Therefore, Plaintiffs' argument that John Doe did something unlawful here reduces to an attempt to apply future legislation to past conduct, which offends fundamental notions of the law. *See Collins v. Youngblood*, 497 U.S. 37, 38, 110 S. Ct. 2715, 2717, 111 L. Ed. 2d 30 (1990) ("Legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts.");

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[2] Plaintiffs are keenly aware of the current state of the law. *See* Opp. at 4, n. 2. Indeed, their assertion here persists despite being so advised by law enforcement. *See* https://rumble.com/v270tuo-extraction-1.1-outside-agency-assist.mp4.html (16:55–18:22).

Eureka Cnty. Bank Habeas Corpus Cases, 35 Nev. 80, 126 P. 655, 661 (1912) ("Under the provision of the Constitution prohibiting ex post facto laws and granting to all persons the equal protection of the law, the Legislature itself cannot make any act punishable which was not so by law at the time it was committed.")

Moreover, contrary to Plaintiffs' suggestion, no defendant has done, nor is alleged to have done, anything violent, and Plaintiff's repeated implications to the contrary—by analogy to riots at the Capitol or a home invasion—are mere hyperbole. *See* Opp. at 2:8–9; 3:4–7; 4:23–24. Rather, the activities alleged in this case amount only to a private citizen's investigation into allegations of misconduct for political purposes, implicating only peaceable political activity the First Amendment protects. *See also Highfields Cap. Mgmt., L.P. v. Doe*, 385 F. Supp. 2d 969, 980 (N.D. Cal. 2005) (noting "a subpoena [to unmask anonymous parties] poses a real threat to chill protected comment on matters of interest to the public"). *AFL–CIO v. FEC*, 333 F.3d 168, 175 (D.C. Cir. 2003) ("The Supreme Court has long recognized that compelled disclosure of political affiliations and activities can impose just as substantial a burden on First Amendment rights as can direct regulation.")

Indeed, Plaintiffs' maneuver is of particular note in this case because it embodies the exact type of attempt at retribution that John Doe rightly fears, thus warranting his anonymity. *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). Indeed, by the news article Plaintiff Schieve now cites, this case inspired the pending legislation Plaintiffs now seek to retroactively apply to this case. *See* Opp. at 4, n. 2 (citing https://mynews4.com/news/local/nevada-bill-banning-gps-tracking-devices-on-cars-gets-bipartisan-support-in-legislature-mayor-hillary-schieve (last visited June 13, 2023)). Thus, allowing that legislation to now govern this action would not only violate traditional prohibitions on ex post facto application of new law, it would also co-opt the Court into Plaintiffs' revenge play.

D. <u>The Law Favors John Doe's First Amendment Interests in Remaining Anonymous</u>

The parties appear to agree that the *Perry* or *Highfields* tests governs this issue. *See* Mot. 2:8–20 (citing *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010)), 10:8–17 (citing *Highfields Cap. Mgmt., L.P. v. Doe*, 385 F. Supp. 2d 969, 975 (N.D. Cal. 2005)); Opp., 7:14–9:2 (discussing and

applying the same tests).[3]

Applying those standards, John Doe has shown a prima facie First Amendment interest in remaining anonymous. *See* Mot., 2:8–3:17, 5:4–8:19.

Plaintiffs' only response on this point relies on a misunderstanding of the import of the facts. *See* Opp., 8:3–16. Plaintiffs assert that John Doe has been inconsistent in his position because he has said that neither instructed McNeely to place a tracking device on any vehicle nor had access to the tracking data. *Id*., 8:6–11. Plaintiffs use these facts to feebly ask, "If John Doe did not engage in these activities, then what anonymous speech is he attempting to protect?" *Id*. 8:11–12. That argument misses the forest through the trees: John Doe's interest in anonymity, and the First Amendment protection he needs, does not lie in the specific method of tracking Plaintiffs. Rather, as the Motion explains his interest lies in his acts of investigation of Plaintiffs for the political purpose of determining whether they had engaged in wrongdoing. *See* Mot., 11:21–25, n. 6. Plaintiffs do not attempt to rebut that John Doe has that interest.

As such, under either potentially applicable legal standard—the *Perry* test or the *Highfields* test (which requires plaintiffs showing first)—Plaintiff must establish a need for John Doe's identity that outweighs his First Amendment interest. *See id*. 2:8–20 (*Perry*), 10:8–17 (*Highfields*).

And, under each standard, Plaintiffs bear a significant burden. *See Perry*, 591 F.3d at 1160 (9th Cir. 2010) ("The question is therefore whether the party seeking the discovery has demonstrated an interest in obtaining the disclosures it seeks ... which is **sufficient to justify the deterrent effect** ... on the free exercise ... of [the] constitutionally protected right of association.") (emphasis added) (internal quotations omitted); *Highfields* , 385 F. Supp. 2d at 975 ("Thus, the plaintiff must adduce *competent evidence*—and the evidence plaintiff adduces must address *all* of the inferences of fact that plaintiff would need to prove in order to prevail under at least one of the causes of action plaintiff asserts."

---

[3] Plaintiffs' Opposition also discusses a more general legal proposition that there is "a presumption of openness in judicial proceedings." *See* Opp., 5:19–7:5 (citing *Doe No. 1 v. Wynn Resorts Ltd.*, No. 219CV01904GMNVCF, 2022 WL 3214651 (D. Nev. Aug. 9, 2022)). *Wynn Resorts*, however, did not involve a First Amendment issue, making *Wynn*, and Plaintiffs' argument relying on it, inapposite, particularly in light of the *Perry* and *Highfields* standards that specifically do govern First Amendment questions.

(emphasis in original)).

Plaintiffs make no serious attempt to satisfy their burden. Plaintiffs produce no evidence whatsoever—no declarations, no documents, nothing. Instead—to address their significant evidentiary burden—they note two inconsequential facts and rely on their inadequate briefing earlier in this case. *See* Opp. 8:17–21. In this argument, Plaintiffs point to evidence that (1) John Doe hired McNeely (2) to investigate Plaintiffs. *See id*. Neither of those acts are tortious, nor do they serve to satisfy even a single element of any of Plaintiffs' claims. Beyond those basic, mundane facts, Plaintiffs only point to their deficient previous briefing to support their claim they have met their evidentiary burdens. *Id*. As the *Highfields* court puts it, "It is not enough for a plaintiff simply to plead and pray," and yet this is exactly what Plaintiffs Opposition does.[4]

E. <u>John Doe's Identity Is not Highly Relevant to the Claims or Defenses in this Case.</u>

As discussed in the Motion, John Doe's identity is irrelevant to any of Plaintiffs' claims. *See* Mot., 8:20–9:2. Plaintiffs' argument in opposition appears to be not that John Doe's identity is relevant to their claims, but rather that "they still may need to seek a protective order depending on the identity and motivations of this 'client.'" Opp. 9:11–13. Plaintiffs do not indicate against what they may need to seek protection from, and their lack of any attempt to explain why John Doe's identity is relevant to any of their claims suggests that Plaintiffs seek that information to enable a fishing expedition to see what harmful information about John Doe, entirely independent from Plaintiffs' claims, may turn up.

Indeed, as the request for his identity remains detached from any relevance to any claim or defense in this case; and given that Plaintiffs do know that John Doe's motives in investigating Plaintiffs were political in nature, John Doe can only reach the single remaining conclusion—that Plaintiffs' seek to use his identity to exact political or government retribution on him—the very reason

---

[4] Plaintiffs utter lack of evidence also distinguishes this case from the single case Plaintiffs cite to support their contention that "[w]hen confronted with this balancing test, courts have had no qualms compelling disclosure." *See* Opp. 8:22–23 (citing *Wirt v. Twitter, Inc.*, No. 21-MC-80166-JSC, 2021 WL 5919846 (N.D. Cal. Dec. 15, 2021)). In stark contrast to this case, the *Wirt* court considered several pieces of evidence the plaintiff presented, concluding that they constituted "competent evidence to support an inference that [defendant] acted with negligence as to the truth or falsity" of the defendant's statement raising a defamation claim. *See id*. at *2.

John Doe entered this case anonymously in the first place and the very reason his conduct is protected under the First Amendment. A vague assertion that Plaintiffs need to know his identity for unspecified reasons of seeking some unspecified protective order cannot reasonably override John Doe's interest in anonymity.

IV. CONCLUSION

Fore the foregoing reasons and those stated in the Motion, the Court should grant John Doe's Motion for Protective Order.

Respectfully submitted this 14th day of June 2023.

DATED: June 14, 2023.

ARMSTRONG TEASDALE LLP

By: */s/ Jeffrey F. Barr*
ALINA M. SHELL, ESQ.
Nevada Bar No. 11711
JEFFREY F. BARR, ESQ.
Nevada Barr No. 7269
7160 RAFAEL RIVERA WAY, SUITE 320
Las Vegas, NV 89113

Attorneys for Defendant John Doe

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the Social Security Number of any person.

DATED: June 14, 2023.

ARMSTRONG TEASDALE LLP

By: */s/ Jeffrey F. Barr*
ALINA M. SHELL, ESQ.
Nevada Bar No. 11711
JEFFREY F. BARR, ESQ.
Nevada Barr No. 7269
7160 RAFAEL RIVERA WAY, SUITE 320
Las Vegas, NV 89113

Attorneys for Defendant John Doe

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Armstrong Teasdale LLP and that on June 14, 2023, I electronically filed the foregoing with the Clerk of the Court by using the e-flex filing system which served all parties of record electronically.

/s/Allie Villarreal
An Employee of Armstrong Teasdale LLP

EXHIBIT LIST

Ex. No.	Description	No. Page
A	Police Report	6

*Number of Pages Does Not Include the Divider Page that Marks the Exhibit Number at the Top of the page.

EXHIBIT A

EXHIBIT A

THIS FORM MUST BE COMPLETED AND TURNED INTO RECORDS WITH EVERY REPORT TAKEN

Case Number 22-8812 Officer Loeschner

Date of Report/Supplement: 11/ 8/22 ■ Original Report ☐ Supplemental Report #____

Incident Type: Outside Assist

Please Check One				
☐ Felony	☐ Gross Misd	☐ Misdemeanor	■ Information Only	Marijuana Use ☐ Y ■ N
Please Check One				
☐ Dictated narrative		■ Narrative completed in ARS		

Arrest: ☐Yes■No ☐Refer to DA ☐Refer to CA ☐Refer Back to Officer ☐ Hold for my review

FINAL STATUS		
☐ OPEN	☐ CLOS - Closed/No follow-up	■ CLOS - Suspended
☐ UNFD – Unfounded	☐ EXCA – Closed Except/Adult	☐ EXCJ – Closed Except/Juvenile
☐ COUR – Courtesy Report	☐ INFO – Information Only	

UPDATE/MODIFY INFORMATION		
Incident Type Modified to:		
Property	Description:	Value:
Serial #/VIN/PLATE:		
Additional Info:		

Case Distribution (Please check all that apply)						
☐ CA		☐ Detectives	☐ P& P	☐ Social Services	☐ Victim Advocate	
☐ Patrol	☐ Traffic	☐ District Attorney	☐ Jan Evans	☐ SMC	☐ SJC	☒ File
☐ RMC		☐ RJC	☐ DART	☐ RIT	☐ Other	

FOR RECORDS USE ONLY

☒ Quality Control/UCR requirements completed by: AJ Split By: SJ

☐ Completed Yellow Note / Date:_____ / By: _____

☐ Email sent/Date: _____ / By: _____

☐ **Supplemental Matching Required** ☐ **Case Management Completed**

RECORDS ARS FORM

Rev. 07/2019

SPARKS POLICE DEPT

1701 E PRATER WAY

SPARKS, NV 89434

Phone
775-353-2279

Fax
775-353-2436

22-8812

Supplement No
ORIG

Reported Date
11/08/2022

Rpt/Incident Typ
OUT AST

Emp #
LOESCHNER, PETER

Administrative Information

Agency	OCA #	Supplement No	Reported Date	Reported Time	CAD Call No
SPARKS POLICE DEPT	22-8812	ORIG	11/08/2022	08:18	223120221

Status	Rpt/Incident Typ
REPORT TO FOLLOW	OUTSIDE ASSIST (NOT OFFICER INVOLVED)

Location	City
3355 KIETZKE LN	RENO

ZIP Code	Rep Dist	Area	Beat	From Date	From Time
89502	K7C7	RS	76	11/08/2022	08:18

Emp #	Assignment	Author	Assignment
S310/LOESCHNER, PETER	DETECTIVES	S310	DETECTIVES

Confidential	RMS Transfer	Prop Trans Stat	Property?	Approving Officer
REQUESTED BY DETECTIVES	Successful	Successful	None	S041

Approval Date	Approval Time
11/30/2022	15:34:10

Person Summary

Invl	Invl No	Type	Name	MNI
SUB	1	I	MCNEELY, DAVID	2502981

Race	Sex	DOB
W	M	02/26/1976

Invl	Invl No	Type	Name	MNI
SUB	2	I	SCHIEVE, HILLARY	693442

Race	Sex	
W	F	[redacted]

SPARKS POLICE DEPT

SUBJECT 1: MCNEELY,DAVID

Involvement	Invl No	Type	Name
SUBJECT	1	INDIVIDUAL	MCNEELY,DAVID

MNI	Race	Sex	DOB	Age	Ethnicity	Juvenile?	Height	Weight	Hair Color	Eye Color
2502981	WHITE	MALE	02/26/1976	46	UNKNOWN	No	6'00"	220#	BROWN	HAZEL

Res Status	PRN
Non-resident	4643791

Type	Address
HOME	2115 PARKWAY DR

City	State	ZIP Code	Date
RENO	Nevada	89502	11/08/2022

Phone Type	Phone No	Date
ALL CELLULAR AND/OR MOBILE PHONES	(775)684-9196	11/08/2022

Employer/School	Position/Grade
5ALPHA PRIVATE INVESTIGATIONS	OWNER/INV.

Location	City
2115 PARKWAY DR	RENO

State	ZIP Code
Nevada	89502

SUBJECT 2: SCHIEVE,HILLARY

Involvement	Invl No	Type	Name
SUBJECT	2	INDIVIDUAL	SCHIEVE,HILLARY

MNI	Race	Sex	[redacted]	Age	Ethnicity	Juvenile?	Height
693442	WHITE	FEMALE		52	NOT OF HISPANIC ORIGIN	No	5'02"

Weight	Hair Color	Eye Color	Dom Violence?	Res Status	PRN
120#	BLONDE/STRAWBERRY	GREEN	No	Resident	4643792

[redacted]

Type	Address
WORK/BUSINESS	1 E 1ST ST

City	State	ZIP Code	Date
RENO	Nevada	89501	11/08/2022

[redacted]

Phone Type	Phone No	Date
BUSINESS	(775)334-2001	11/08/2022

Narrative

Detective Loeschner #310

Case assignment:

On 11/8/2022, Lieutenant PATTON tasked me with the following investigation. He advised yesterday he was informed by Chief CRAWFORTH of an incident that occurred in Reno, Nevada, involving City of Reno Mayor, Hillary SCHIEVE.

SCHIEVE took her vehicle to Reno Tahoe Auto Group, as she is acquainted to the owner, Lucy OLSON. The vehicle was put up on a lift and an unknown, small black box was located. The box was attached magnetically to the vehicle frame near the spare tire. The box was removed and opened. The box contained what appeared to be a tracking device.

After the device was located, Reno Police Department was informed of the incident. Ultimately, it was decided for Sparks Police Department to investigate the origins of the device and who was responsible for placing it on SCHIEVE's vehicle. I requested Detective DACH to assist with the investigation.

Detective DACH was tasked with forensic analysis of the device, while I was assigned lead in the investigation. Lieutenant PATTON provided me with photographs he had received from OLSON. The photographs were of the device, where it was located, and a screenshot the device associated with a company called Family 1st. The

photographs were uploaded to Evidence.com.

Authorship of Subpoena:

Detective DACH informed me the device appeared to be associated to the company, Family 1st, and appeared to be associated with Verizon. DACH authored and sent subpoenas to both of the companies requesting for records. DACH communicated with Family 1st and learned the device was not a part of their network. Family 1st provided DACH with information of a sister company, which DACH reached out to. The device appears to be sold on more than one platform.

SIM Card Analysis:

DACH informed me the device has a SIM card. DACH downloaded the SIM card and discovered the card to be attached to the phone number 577-598-2747. Furthermore, the SIM card was from AT&T. DACH then authored a subpoena for AT&T for records.

Device owner identification:

On 11/9/2022, DACH informed me he received information from the sister company of Family 1st concerning the identification of the person who purchased the tracker, as well as data. DACH informed me the person who purchased the tracker was identified as David MCNEELY. Subsequent research of MCNEELY discovered he is the owner of "5 Alpha Industries", a private investigation firm. The email listed is dmcneely@5alpha.com, and the phone number listed is 775-684-9196. Research on the phone number comes back to David MCNEELY of 2115 Parkway Drive, Reno, Nevada.

Criminal history checks of MCNEELY:

Criminal history checks were conducted by SPD Dispatch on 11/10/2022 at my request. [redacted]

Interview with MCNEELY:

On 11/16/2022, Detective DACH and I contacted MCNEELY at his residence located 2115 Parkway Dr. MCNEELY agreed to speak with us and welcomed us into his residence. The following is a synopsis of the information obtained during the interview, and not meant to be verbatim.

MCNEELY advised he was assigned to Tri-Net (an undercover narcotics task force for twenty-two years). He said he has been a private investigator since 2015. He does not have any employees and the majority of his records are held digitally. He advised he uses a wide range of methods in his investigations as long as they are within the confines of the law. He is certified as a private investigator through the State of Nevada and provided me with his certification card. He advised he does private investigations for sexual assaults, missing persons, infidelity and a broad range of investigations.

I informed MCNEELY of the discovery of the tracker on Hillary SCHIEVE's vehicle and how we were able to identify where the tracker came from. MCNEELY said there is no threat to the Mayor. He advised the intent behind the investigation was not to cause harm to anyone. He advised he was not able to provide the name of the client without a subpoena signed by a judge. MCNEELY expressed liability concerns if he were to divulge the information. He advised the motive behind the investigation was political. MCNEELY advised there were allegations which he was not going to divulge. He said his investigation completely unfounded the allegation and this was told to the client. MCNEELY advised he understands if he was still operating as a law enforcement officer, he would need a search warrant but as a private investigator, he only needs a tracker.

MCNEELY advised the tracker was on the vehicle less than a month. MCNEELY said the battery life will vary depending on the activity of the tracker (as it is motion detected). MCNEELY advised the tracker was used on multiple different vehicles. He advised he often will set the tracker and not recover it because they are inexpensive. MCNEELY advised the extent of the investigation was utilizing the electronic tracker to look at "possible areas" where SCHIEVE was alleged to have been frequenting. No other surveillance methods were utilized.

SPARKS POLICE DEPT

Narrative

For full details, please review body worn camera footage.

Interview with SCHIEVE:

On 11/17/2022, myself (Detective LOESCHNER) and Detective DACH interviewed Hillary SCHIEVE at the SPD detectives conference room. The following is a synopsis of the information obtained during the interview. For full details, please see audio and video recordings.

SCHIEVE provided an overview of how the investigation began. She described strange vehicles were appearing outside of her home late at night (3-4 A.M). She also mentioned she felt like she was being followed by cars as she was traveling. She said it was campaign season and strange messages were sent to her on social media.

Her vehicle was leaking oil and she took it to the dealership where she bought the car. She said her girlfriend owns the dealership. While servicing the vehicle, the tracker was located. Her vehicle is a 2017-2018 white Land Rover. SCHIEVE described the suspicious vehicle as a red vehicle. She showed me a photograph which appeared to be a small SUV or crossover similar to a Honda CRV, red in color.

She described her driveway as connected directly to the sidewalk. She said the street is dark and there is a lot of activity on the other end of the street. She described incidents in the past involving BLM when people would yell at her residence while driving by. She described her awareness being very high because of the suspicious activity.

Next, Detective DACH and I explained what the investigation had uncovered in terms of the origins and activity regarding the tracking device. We explained that no criminal element had been established with the use of the tracker. I explained 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.

SCHIEVE expressed she lived a very boring life, and she was very disturbed by the fact someone placed a tracker on her vehicle. DACH and I explained the use of the tracker was not illegal for a private citizen. We explained that the laws in Nevada do not prohibit a private citizen (or in this case, a private investigator) from using electronic tracking devices.

SCHIEVE said she believed Robert BEADLES is responsible for hiring the investigator because he has had her on his website and has spent millions of dollars trying to get certain candidates elected. She described a website where there are posts about her, and he is very wealthy, which is why she believes he may be behind the incident.

SCHIEVE asked if the private investigator was here. She talked about how BEADLES has offered rewards for anyone who assists with leading to the arrest of elected officials, and she looked at reports and found out that Tom GREEN was involved with BEADLES. We confirmed the investigator, David MCNEELY, is located in Reno and we had not found any connection to BEADLES or Tom GREEN. DACH explained it is possible for GREEN and MCNEELY to know each other because they both were involved in undercover narcotics law enforcement in the past.

SCHIEVE advised she was contemplating contacting the attorney general in reference to the investigation. We spoke about how law enforcement used to not need a search warrant to place an electronic tracking device, but this changed in recent years.

We advised SCHIEVE that the investigation was solely electronic tracking, and no other methods were used, according to MCNEELY.

She expressed how she felt it was wrong for someone to invade her privacy in this manner and expressed she would be following up the incident in different ways. She was provided with my contact information.

For further details, please see the supplement completed by Detective DACH and audio/video recordings.

Final Status:

Closed / No Follow-Up

THIS FORM MUST BE COMPLETED AND TURNED INTO RECORDS WITH EVERY REPORT TAKEN

Case Number 22-8812 Officer K. Dach #034

Date of Report/Supplement: 11/23/22 ☐ Original Report ■ Supplemental Report # 1

Incident Type: Outside Agency Assist

Please Check One				
☐ Felony	☐ Gross Misd	☐ Misdemeanor	■ Information Only	Marijuana Use ☐ Y ☐ N
Please Check One				
☐ Dictated narrative		■ Narrative completed in ARS		Recorded Oral Statement

Arrest: ☐ Yes ■ No ☐ Refer to DA ☐ Refer to CA ☐ Refer Back to Officer ☐ Hold for my review

FINAL STATUS		
☐ OPEN	☐ CLOS - Closed/No follow-up	■ CLOS - Suspended
☐ UNFD – Unfounded	☐ EXCA – Closed Except/Adult	☐ EXCJ – Closed Except/Juvenile
☐ COUR – Courtesy Report	☐ INFO – Information Only	

UPDATE/MODIFY INFORMATION		
Incident Type Modified to:		
Property	Description:	Value:
Serial #/VIN/PLATE:		
Additional Info:		

Case Distribution (Please check all that apply)						
☐ CA		☐ Detectives	☐ P& P	☐ Social Services	☐ Victim Advocate	
☐ Patrol	☐ Traffic	☐ District Attorney	☐ Jan Evans	☐ SMC	☐ SJC	☒ File
☐ RMC		☐ RJC	☐ DART	☐ RIT	☐ Other	

FOR RECORDS USE ONLY

☒ Quality Control/UCR requirements completed by: AF Split By: SJ

☐ Completed Yellow Note / Date: _____ / By: _____

☐ Email sent/Date: _____ / By: _____

☐ **Supplemental Matching Required** ☐ **Case Management Completed**

RECORDS ARS FORM

Rev. 02/21

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

HILLARY SCHIEVE, an individual,
VAUGHN HARTUNG, an individual,

Plaintiffs,

v.

DAVID MCNEELY, an individual, 5 ALPHA INDUSTRIES, LLC, a Nevada Limited-liability company, and DOES 1 Through X and ROES 1 through X, inclusive,

Defendants.

/

CASE NO.: CV22-02015

DEPT. NO.: 15

ORDER REFERRING MOTION TO THE DISCOVERY COMMISSIONER

Defendant John Doe's motion for protective order filed May 24, 2023, is referred to Commissioner Ayers for substantive analysis and recommendation. See NRCP 16.1(d); WDCR 24.

IT IS SO ORDERED.

DATED this 11th day of July 2023.

DAVID HARDY
District Judge

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe that on the 11 day of July, 2023, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

STEPHANIE GLANTZ, ESQ.
JANE SUSSKIND, ESQ.
BRITTANY LLEWELLYN, ESQ.
ADAM HOSMER-HENNER, ESQ.
PHILIP MANNELLY, ESQ.
RYAN GORMLEY, ESQ.
CHELSEA LATINO, ESQ.
ALINA SHELL, ESQ.
JEFFREY BARR, ESQ.

Carrie Lipparelli
Judicial Assistant

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

HILLARY SCHIEVE, an individual; VAUGHN HARTUNG, an individual, Plaintiffs, v. DAVID MCNEELY, an individual; 5 ALPHA INDUSTRIES, LLC, a Nevada limited liability company; and DOES I through X and ROES I through X, inclusive, Defendants.	Case No. CV22-02015 Dept. No. D15 **ORDER PARTIALLY GRANTING DEFENDANTS DAVID MCNEELY AND 5 ALPHA INDUSTRIES, LLC'S MOTION TO DISMISS, OR ALTERNATIVELY, MOTION FOR A MORE DEFINITE STATEMENT**

Defendants David McNeely and 5 Alpha Industries, LLC ("McNeely Defendants") filed a Motion to Dismiss, or Alternatively, Motion for a More Definite Statement ("Motion") on March 9, 2023. Having reviewed the Motion and associated briefing and good cause appearing, the Court hereby partially grants the Motion as set forth below.

1. Plaintiffs filed an Amended Complaint, asserting eight causes of action against the McNeely Defendants: (1) invasion of privacy – intrusion upon seclusion; (2) invasion of privacy – public disclosure of private facts; (3) violation of NRS Chapter 200, anti-doxxing; (4) negligence; (5) trespass; (6) civil conspiracy; (7) aiding and abetting; and (8) declaratory relief. Pertinent here, Plaintiffs also sought injunctive relief and attorney fees as special damages.

2. The Motion sought dismissal for failure to state a claim of Plaintiffs' claims for invasion of privacy – public disclosure of private facts; violation of NRS Chapter 200, anti-doxxing; negligence; and declaratory relief and requests for injunctive relief and attorney fees as special damages.

3. Nevada is a notice-pleading jurisdiction. *See* NRCP 8(a). Under NRCP 12(b)(5), a party may move to dismiss a cause of action for failure to state a claim. A cause of action should be dismissed for failure to state a claim if it "appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). In evaluating a motion to dismiss for failure to state a claim, the court must accept all factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 823, 221 P.3d 1276, 1280 (2009). The court, however, need not accept as true legal conclusions cast in the form of factual allegations. *Nevada Yellow Cab Corp. v. State*, 521 P.3d 418, 2022 WL 17367603, Dkt. No. 83014 (Nev. Dec. 1, 2022) (unpublished). The allegations "must be legally sufficient to constitute the elements of the claim asserted." *Sanchez.*, 125 Nev. at 823, 221 P.3d at 1280.

Invasion of Privacy – Public Disclosure of Private Facts

4. To maintain this claim, Plaintiffs must "prove that a public disclosure of private facts has occurred which would be offensive and objectionable to a reasonable person of ordinary sensibilities." *Montesano v. Donrey Media Grp.*, 99 Nev. 644, 649, 668 P.2d 1081, 1084 (1983).

5. The Court finds that the allegations in the Amended Complaint satisfy Nevada's notice-pleading standards to state a claim for invasion of privacy – public disclosure of private facts. Thus, the Motion's request to dismiss this claim is denied.

Violation of NRS Chapter 200, Anti-Doxxing

6. Plaintiffs' third cause of action is for violation of AB 296 (2021), which was enacted as NRS 41.1347. This statute "establishes a civil cause of action against a person who commits certain acts commonly referred to as 'doxxing.'" *See* Nevada Assembly Bill 296, Legislative Counsel's Digest (2021). "Doxxing" is understood to mean the "'use of the Internet to search for and publish identifying information about a particular individual, typically with malicious intent.'" *Friends of Animals v. Bernhardt*, 15 F.4th 1254, 1277 (10th Cir. 2021) (quoting Jeffrey Pittman, Privacy in the Age of Doxxing, 10 S.J. of Bus. & Ethics 53, 54 (2018)). Under NRS 41.1347, a plaintiff can maintain a private right of action against a person who "disseminates any personal identifying information or sensitive information" of the plaintiff without their consent and subject to several other requirements. *See* NRS 41.1347(1). "Sensitive information" means information concerning "sexual orientation," "[w]hether a person is transgender or has undergone a gender transition," and "[t]he human immunodeficiency virus status of a person." NRS 41.1347(7)(e). "Personal identifying information" is defined as "any information designed, commonly used or capable of being used, alone or in conjunction with any other information, to identify a living or deceased person or to identify the actions taken, communications made or received by, or other activities or transactions of a living or deceased person." NRS 205.4617(1). The statute gives examples, including name, driver's license number, social security number, credit card number, date of birth, fingerprints, facial scan identifiers, personal identification number, alien registration number, professional license number, and other similar forms of identifying information. *See id.*

7. The Court finds that the information that the Amended Complaint alleges was "disseminated," including the location of Plaintiffs' vehicles and photographs of Schieve does not constitute "personal identifying information" or "sensitive information" under the statutory definitions. Plaintiffs' arguments to the contrary would expand the statutorily defined terms of "personal identifying information" and "sensitive information" beyond what the Legislature prescribed. Thus, this claim is dismissed without prejudice.

Negligence

8. Negligence requires a showing of duty, breach of duty, legal causation, and damages. *Sanchez*, 125 Nev. at 824, 221 P.3d at 1280. The existence of a duty is a question of law. *Scialabba v. Brandise Const. Co.*, 112 Nev. 965, 968, 921 P.2d 928, 930 (1996). Plaintiffs premise their claim for negligence on allegations that the McNeely Defendants violated a duty to protect Plaintiffs from harm from third parties and violated a duty to exercise reasonable care in acting as a private investigator. In their opposition, Plaintiffs clarified that they are not pursuing relief pursuant to a theory of negligence per se.

9. As a general rule, a person does not have a duty to protect another from harm by a third party. *Scialabba*, 112 Nev. at 968, 921 P.2d at 930. A duty to prevent harm by a third party arises only where a "special relationship" exists between the parties, such as in the case of a landowner-invitee, businessman-patron, employer-employee, school district-pupil, hospital-patient, and carrier-passenger. *Id.* The rationale behind the imposition of such liability is that the "ability of one of the parties to provide for [their] own protection has been limited in some way by [their] submission to the control of the other." *Id.* In the "absence of this degree of control, there is no special relationship giving rise to a duty of reasonable care." *Sparks v. Alpha Tau Omega Fraternity, Inc.*, 127 Nev. 287, 297, 255 P.3d 238, 245 (2011).

10. The Court finds that here there is no special relationship between the McNeely Defendants and Plaintiffs, *i.e.*, a private investigator and the subject of an investigation, giving rise to a duty of care. Plaintiffs allege that a special relationship exists. (*See* Am. Compl. at ¶ 61). But that is merely a legal conclusion, which is not entitled to the assumption of truth. *See Nevada Yellow Cab Corp.*, 521 P.3d at 418. Nevada has not recognized the existence of a special relationship between a private investigator and the subject of the investigation. And, unlike the relationships where Nevada law has recognized a special relationship, such as those identified above, a private investigator-subject of an investigation relationship does not feature any of the elements of control necessary to support the finding of a special relationship.

11. Next, as to Plaintiffs' theory that the McNeely Defendants violated a duty to exercise reasonable care in acting as a private investigator, Plaintiffs rely on *Nakamoto v. Kawauchi*, 418

P.3d 600, 617 (Haw. 2018) for the proposition that private investigators owe a duty of care to the subjects of their investigations based on the state's licensing statute, which in Nevada is NRS Chapter 648. The Amended Complaint, however, does not allege that the McNeely Defendants violated any obligations imposed by NRS Chapter 648. More to the point, *Nakamoto* only supports the legal conclusion that, under a state's licensing regime of a private investigator, the only duty a private investigator owes to the subject of the investigation is to "conduct an investigation honestly, truthfully, with fair dealing, and to report the results of the investigation accurately, without misrepresenting any facts." *Nakamoto*, 418 P.3d at 619. This duty arises because the "subjects of the surveillance . . . lives [can be] materially and adversely affected by the defendant's allegedly false report of their activities." *Id.* at 618-19 (quoting *Devlin*, 371 A.2d at 394) ("This is particularly so where it is alleged that the intentional rendering of false information actually induced" a divorce lawsuit). Here, there is no allegation that the McNeely Defendants provided false information to their client(s); thus, Plaintiffs' general negligence theory fails. For these reasons, Plaintiffs' claim for negligence is dismissed without prejudice. The Court acknowledges Plaintiffs' argument that discovery may reveal factual predicates to establish a duty and may seek to amend if they have an adequate factual basis to establish a negligence duty in the future.

Declaratory Relief

12. The Amended Complaint appears to seek a declaration that the McNeely Defendants' conduct violated AB 296 (2021), NRS 200.575, and NRS 199.300.

13. Plaintiffs cannot premise their declaratory relief claim on NRS 199.300 or NRS 200.575 because neither statute provides for a private right of action. Under Nevada law, declaratory relief is not available to remedy an alleged statutory violation when no private right of action under the statute exists. *See Richardson Constr., Inc. v. Clark Cty. Sch. Dist.*, 123 Nev. 61, 65, 156 P.3d 21, 23 (2007) (explaining "that when a statute does not expressly provide for a private cause of action, the absence of such a provision suggests that the Legislature did not intend for the statute to be enforced through a private cause of action"); *Builders Ass'n of N. Nev. v. City of Reno*, 105 Nev. 368, 369, 776 P.2d 1234, 1234 (1989) (explaining that the Uniform Declaratory Judgments Act—codified in NRS Chapter 30—"does not establish a new cause of action or grant

jurisdiction to the court when it would not otherwise exist"); *Cabral v. Caesars Ent. Corp.*, 467 P.3d 638 (Nev. 2020) (unpublished) ("This court will not allow a party to overcome the lack of a private right of action by repackaging an alleged statutory violation as a declaratory relief action.") (citing *Builders Association*, 105 Nev. at 369-70, 776 P.2d at 1234-35).

14. Plaintiffs' claim for declaratory relief based on AB 296 (2021) fails for the same reasons that Plaintiffs' claim for violation of AB 296 (2021) fails. Further, to the extent the claim for violation of AB 296 (2021) survived dismissal, the claim for declaratory relief would warrant dismissal as being duplicative and unnecessary. *See El Capitan Club v. Fireman's Fund Ins. Co.*, 89 Nev. 65, 70, 506 P.2d 426, 429 (1973) (providing that a court may "properly exercise its discretion to refuse declaratory relief on the ground that other remedies are available"); Restatement (Second) of Judgments § 33, cmt. c (1982) ("The court should lean toward declining the action if another remedy, such as a coercive action on an existing claim, is plainly available and would have wider res judicata effects."); *Boca Park Martketplace Syndications Grp., LLC v. Higco, Inc.*, 133 Nev. 923, 926, 407 P.3d 761, 764 (2017) (relying on this treatise); *AmSouth Bank v. Dale*, 386 F.3d 763, 787 (6th Cir. 2004) ("Where a pending coercive action, filed by the natural plaintiff, would encompass all the issues in the declaratory judgment action, the policy reasons underlying the creation of the extraordinary remedy of declaratory judgment are not present, and the use of that remedy is unjustified."). For these reasons, Plaintiffs' claim for declaratory relief is dismissed without prejudice.

Injunctive Relief and Attorney Fees as Special Damages

15. NRCP 12(b)(5) only authorizes a motion for "failure to state a claim upon which relief can be granted." Because Plaintiffs' request for injunctive relief and attorney fees as special damages are remedies, not claims, there is no basis to dismiss either under NRCP 12(b)(5). Thus, the Motion's request to dismiss these forms of relief is denied. The relief sought may be visited after discovery or other motion practice is commenced.

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Accordingly, Plaintiffs' third cause of action for violation of NRS Chapter 200, anti-doxxing; fourth cause of action for negligence; and eighth cause of action for declaratory relief are dismissed without prejudice pursuant to NRCP 12(b)(5); the additional relief sought by the Motion is denied.

IT IS SO ORDERED.

DATED: July 13, 2023.

DAVID A. HARDY
District Judge

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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe that on the 13 day of July, 2023, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

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