**IN THE SUPREME COURT OF THE STATE OF NEVADA**

* * * * *

JOHN DOE,

*Petitioner,*

vs.

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

*Respondents,*

and,

HILLARY SCHIEVE; VAUGHN HARTUNG, DAVID MCNEELY; and 5 ALPHA INDUSTRIES, LLC.

*Real Parties in Interest.*



Case No.: 89277

District Court Case No.: CV22-02015

# ANSWER TO JOHN DOE'S PETITION FOR WRIT OF PROHIBITION

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## NRAP 26.1 DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the justices of this court may evaluate possible disqualification or recusal.

Hillary Schieve or Vaughn Hartung are individuals and undersigned counsel have represented Hillary Schieve and Vaughn Hartung throughout this action.

DATED: October 29, 2024.

McDONALD CARANO LLP

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## ROUTING STATEMENT

Real Parties in Interest Hillary Schieve ("Schieve") and Vaughn Hartung ("Hartung") agree with Petitioner that retention by the Supreme Court is appropriate pursuant to NRAP 17(d)(2)(C).

## STATEMENT OF THE RELIEF SOUGHT BY THE PETITION

Petitioner asks this Court to vacate the district court's order compelling the disclosure of John Doe's identity and to shield John Doe's identity "during discovery and trial." Real Parties in Interest Hillary Schieve and Vaughn Hartung ask this Court to deny the Petition and affirm the decision of the district so that this case can proceed as permitting John Doe to remain anonymous during trial would completely prevent full and fair discovery and would let John Doe avoid the consequences of his intentional tortious acts.

## STATEMENT OF THE ISSUES

Whether the district court correctly compelled the disclosure of the identity of a defendant, John Doe, as there was no good cause to keep his identity secret from Schieve and Hartung, the courts, or the public?

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## STATEMENT OF THE CASE AND FACTS

After discovering that a GPS tracking device had been placed on her personal vehicle without her knowledge or consent, Schieve sued David McNeely and 5 Alpha Industries, LLC ("McNeely Defendants") and unnamed co-defendants including John Doe. 1-PA-45-46. Shortly thereafter, Schieve moved for leave to issue subpoenas to the McNeely Defendants seeking documents sufficient to identify the individual or entity that hired the private investigators. 1-PA-20-27. On January 20, 2023, the district court granted Schieve's request, finding "good cause to permit early discovery for the limited purpose of identifying the 'Doe' defendant(s)." 1-PA-28.

After repeatedly avoiding service, the McNeely Defendants were ultimately served with the subpoenas, and two days later, objected on the basis that the identity of their client is a trade secret. 1-PA-31. After a meet-and-confer, on February 2, 2023, Schieve moved to compel compliance with the subpoenas. 1-PA-30. During the briefing, an Amended Complaint was filed to add Hartung as a plaintiff as he had become aware that a GPS tracking device had also been placed on his private vehicle and he joined the motion to compel. 1-PA-184-85. After

full briefing by the parties, the motion was referred to the discovery commissioner. 1-PA-184-85.

On March 15, 2023, the Discovery Commissioner issued a Recommendation for Order ("Recommendation"). 1-PA-185. The Discovery Commissioner found that the identity of John Doe was discoverable under NRCP 26(b)(1) and that "Defendants had not demonstrated that the information sought by Plaintiffs is protected under NRS 49.325 or NRS 648.200." 1-PA185.

The McNeely Defendants objected to the Recommendation. 1-PA-185. On May 4, 2023, and after full briefing and oral argument on the matter, the district court denied the objection to the Recommendation in its entirety and ordered the McNeely Defendants to produce the information by May 12, 2023. 1-PA-185. The very next day a party purporting to be "John Doe" appeared in this action and filed an answer to the Amended Complaint. 1-PA-64. The McNeely Defendants filed an answer on May 18, 2023 after their motion to dismiss only succeeded in dismissing the third (statutory anti-doxxing), fourth (negligence), and eighth (declaratory relief) claims for relief asserted by Schieve and Hartung. The district court found that Schieve and Hartung had stated

a claim for relief under Nevada's notice pleading standard for Invasion of Privacy - Intrusion Upon Seclusion; Invasion of Privacy - Public Disclosure of Private Facts; Trespass; Civil Conspiracy; and Aiding and Abetting. 1-PA-2-9.

On May 12, 2023, the McNeely Defendants filed a Petition for Writ of Prohibition or Mandamus with the Nevada Supreme Court and John Doe filed a Proposed Amicus Curiae Brief on May 19, 2023. 1-PA-186. This Court entered its *Order Denying Petition for Writ of Mandamus or Prohibition*, finding that "Nevada does not recognize any privilege between private investigators and their clients" and that "a single client's identity does not fall within the definition of a trade secret." *McNeely v. Dist. Ct.,* Case No. 86559 (Order Denying Petition for Writ of Mandamus or Prohibition, April 14, 2024). This Court declined to consider John Doe's separate First Amendment issues that are presented in the current Petition. *Id.*

The matter then returned to the district court and John Doe filed a *Renewed Motion for Protective Order* on April 18, 2024. 1-PA-186. The matter was fully briefed and referred to the Discovery Commissioner on May 14, 2024. *Id.* The Discovery Commissioner again ruled in favor of

Schieve and Hartung, 1-PA-184, and the district court confirmed this Recommendation over John Doe's objections. 1-PA-236. John Doe then filed the instant writ petition.

This litigation has essentially been stayed at the pleading stage due to the various defendants repeated efforts to conceal the identify of John Doe. John Doe specifically took the position that he "will not disclose or make documents available for inspection pending the resolution of the motion for a protective order, as such documents either contain or could lead to the discovery of identifying information regarding John Doe." 1-PA190. The Discovery Commissioner found that John Doe was "participating only to the extent he chooses to do so and only to obtain relief that will benefit his position." *Id.*

## STANDARD OF REVIEW

This Petition seeks relief from a discovery matter, the district court's denial of John Doe's *Renewed Motion for Protective Order*, which sought to quash subpoenas issued to the McNeely Defendants. 1-PA-11-27. Accordingly, the appropriate standard of review is an abuse of discretion standard. "Discovery matters are within the district court's sound discretion," and this Court will not "disturb a district court's ruling

regarding discovery unless the court has clearly abused its discretion." *Club Vista Fin. Servs., LLC v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012). This is true even if the discovery matter involves the assertion of privilege or implicates the First Amendment. *Cotter v. Eighth Jud. Dist. Ct.*, 134 Nev. 247, 249, 416 P.3d 228, 232 (2018); *see also Toll v. Wilson*, 135 Nev. 430, 435, 453 P.3d 1215, 1219 (2019) ("We review the district court's determination whether such discovery [sought in the anti-SLAPP context] is necessary for an abuse of discretion."). Nevada has not adopted the Ninth Circuit's de novo standard of review for any "determination of privilege." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1159 (9th Cir. 2010). Nor should Nevada adopt this standard, which would deviate from a substantial volume of this Court's precedent. *See Cotter*, 134 Nev. at 249.

Under the deferential abuse of discretion standard, this Court reviews legal questions de novo and "gives deference to the district court's findings of fact." *Cotter,* 134 Nev. at 249 (internal quotation marks and citations omitted). The district court's factual findings "will not be set aside unless they are clearly erroneous or not supported by substantial

evidence." *Canarelli v. Eighth Judicial Dist. Court*, 136 Nev. 247, 250-51, 464 P.3d 114, 119 (2020).

## SUMMARY OF ARGUMENT

John Doe's legal position is that unlawful and tortious surveillance methods still warrant First Amendment protection, permitting John Doe to remain completely anonymous during the entirety of a civil tort lawsuit. This misinterpretation of the First Amendment has been "vigorously and forthrightly rejected." *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 568 (1972). "The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office." *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971).

John Doe hired private investigators David McNeely and 5 Alpha Industries, LLC (the "McNeely Defendants") to surreptitiously install GPS tracking devices on the private vehicles of Hillary Schieve and Vaughn Hartung ("Schieve," "Hartung," or "Real Parties in Interest"), monitoring and tracking their every movement for weeks or months. This writ petition is not about whether Schieve and Hartung's privacy claims have legal merit. The district court already found this to be the case for

most of Schieve and Hartung's privacy and trespass claims, which survived the NRCP 12(b)(5) analysis and were found to have stated a valid claim for relief. 1-PA-61; *see also Ringelberg v. Vanguard Integrity Pros.-Nev., Inc.*, No. 2:17-cv-01788-JAD-PAL, 2018 WL 6308737, at *8–9 (D. Nev. Dec. 3, 2018) (recognizing that the installation of GPS tracking devices on private vehicles in Nevada can serve as a potential ground for the tortious invasion of privacy). This writ petition is also not about whether John Doe had a First Amendment interest in invading the privacy of Schieve and Hartung in order to collect information about them. This too was decided by the district court based on clear precedent from the United States Supreme Court. 1-PA-197; *Zemel v. Rusk*, 381 U.S. 1, 17, 85 S. Ct. 1271, 1281 (1965) ("The right to speak and publish does not carry with it the unrestrained right to gather information.").

The sole issue presented by this writ petition, which has been presented unsuccessfully by John Doe on at least four prior occasions, is whether John Doe has a right to conceal his identity in the context of a civil lawsuit. "Firmly embedded in the American judicial system is a presumption of openness in judicial proceedings." *Doe No. 1 v. Wynn Resorts Ltd.*, No. 2:19-cv-01904-GMN-VCF, 2022 WL 3214651, at *3 (D.

Nev. Aug. 9, 2022) (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569-574 (1980)). 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.*, 2022 WL 3214651, at *3 (quotations omitted).

Even putting aside all of the legal errors and misguided analysis, John Doe simply fails to evidence a specific harm to him from being identified in this case. 1-PA-193 ("John Doe also does not argue that disclosure of his identity will subject him to public harassment, ridicule, or significant personal embarrassment."). The cases that John Doe relies upon and distorts involve situations where an anonymous party has a specific interest in remaining anonymous such as the public disclosure of private sexual orientation. *Perry v. Schwarzenegger*, 591 F.3d 1147, 1160 (9th Cir. 2010). John Doe fails to demonstrate any personal harm that would befall him if he were revealed as the individual who hired the private investigators.

This litigation has now completely stalled as John Doe and the McNeely Defendants have refused to disclose the crucial identity of John

Doe based on a series of shifting defenses and objections that are contrary to law. The McNeely Defendants failed to stop the disclosure based on an unsupported assertion that Nevada had a private investigator-client privilege. *But see, DeChant v. State*, 116 Nev. 918, 926-27, 10 P.3d 108, 113 (2000). The McNeely Defendants then claimed that the identity of a private investor's client was a confidential trade secret, but this Court rejected that approach as well. 1-PA-185.

Now, John Doe takes the extreme position that his identity can be concealed not just under seal and from the public, but from Schieve and Hartung, the district court, and the jury for the entirety of the lawsuit. No authority or evidence supports such a result. Even if John Doe's position were legally sound, the disclosure of a co-defendant and co-conspirator's identity is of such importance for the integrity of the litigation that any balancing test would resolve in favor of Schieve and Hartung.

## ARGUMENT

### I. The First Amendment is Not Implicated or Infringed in this Action.

John Doe's argument is based on a false premise – that he engaged in anonymous political activity protected by the First Amendment. Pet. 13. John Doe contends that his alleged political goals – "hiring a private investigator to investigate elected officials" – warrant protection for his non-speech conduct – surreptitiously causing a GPS tracker to be installed on Schieve and Hartung's private vehicles and violating their privacy rights. Pet. 16. This false premise that individuals have an unchecked right to exercise their First Amendment rights whenever and however they please has been "vigorously and forthrightly rejected." *Lloyd Corp*, 407 U.S. at 568. The United States Supreme Court and the Ninth Circuit Court of Appeals have addressed the same issues that John Doe raises and tries to claim as novel, and they have firmly rejected John Doe's position in its entirety.

**A. There Is No First Amendment Right to Unlawful Newsgathering.**

Even generously describing John Doe's conduct as "newsgathering," does not warrant First Amendment protection. "The right to speak and publish does not carry with it the unrestrained right to gather information." *Zemel v. Rusk*, 381 U.S. 1, 17, 85 S. Ct. 1271, 1281 (1965).

Consistent with the United States Supreme Court's holding in *Zemel*, the Ninth Circuit has also held that "[n]o interest protected by the First Amendment is adversely affected by permitting damages for intrusion to be enhanced by the fact of later publication of the information that the publisher improperly acquired." *Dietemann v. Time, Inc.*, 449 F.2d 245, 250 (9th Cir. 1971).

The Ninth Circuit in *Dietemann* effectively foreclosed John Doe's entire argument by rejecting a First Amendment defense to newsmen who used subterfuge to gain entrance to the plaintiff's home wherein they photographed him and recorded his conversation. 449 F.2d at 245. The Ninth Circuit held that "A rule forbidding the use of publication as an ingredient of damages would deny to the injured plaintiff recovery for real harm done to him without any countervailing benefit to the legitimate interest of the public in being informed. The same rule would encourage conduct by news media that grossly offends ordinary men." *Id.* John Doe has no way to distinguish *Dietemann* or to disavow its applicability.

A private investigator cannot break into a house to obtain information and he cannot surreptitiously install a GPS tracking device

on a private vehicle. Individuals do "not generally have a First Amendment right to access private property for expression." *Wright v. Incline Vill. Gen. Improvement Dist.*, 665 F.3d 1128, 1137 (9th Cir. 2011); *S.O.C., Inc. v. Mirage Casino-Hotel*, 117 Nev. 403, 414, 23 P.3d 243, 250 (2001) (concluding that "the district court did not err in making a preliminary finding that the sidewalks in question are private property and therefore not subject to the reach of the First Amendment"). If political protesters can be held liable for trespass without running afoul of the First Amendment, then John Doe certainly should have to disclose his name so that civil litigation against him for much more serious conduct can proceed. It is further immaterial whether John Doe trespassed directly to install the GPS devices or merely conspired with the McNeely Defendants. "It is consistent with the First Amendment to impose tort liability where, as here, the defendant personally directs the activities of others such that he creates a foreseeable risk of injury to others." *Doe v. Mckesson*, No. 17-30864, 2023 WL 4044558, at *17, n. 12 (5th Cir. June 16, 2023) (considering situation where the defendant allegedly "organized the protest such that he knew, or should have known, that violence would likely ensue. Doe says that Mckesson

arranged for the protesters to meet in front of the Baton Rouge police station, blocking entry to the station and access to the adjacent streets" and further noting that "Doe failed to offer sufficient evidence to justify his proceeding anonymously").

### B. There is No First Amendment Right to Commit Trespass or the Invasion of Privacy.

John Doe was not sued for criticizing public officials or even for hiring a private investigator to gather information about public officials. He was sued for the surreptitious installation and use of a GPS tracking device on Schieve and Hartung's private vehicles, which is recognized tortious conduct. *Ringelberg*, 2018 WL 6308737, at *8–9.

This Court has already found that Schieve and Hartung have "satisfied the notice-pleading standards to state a claim for" an invasion of privacy and for trespass. 1-PA58. Schieve and Hartung 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-six states, including

Nevada as of July 1, 2023. NRS 200.930; *see also* Assemb. B. 356, 2023 Leg., 82d Sess. (Nev. 2023).

## II. John Doe Does Not Challenge that the Requested Information is Discoverable.

The Discovery Commissioner flatly rejected John Doe's argument about relevance as "not compelling." 1-PA-187. John Doe again makes the same absurd argument that "John Doe's identity is not relevant to any of the claims or defenses at issue." Pet. 18. Here, the Discovery Commissioner outlined numerous reasons why the identity of John Doe was relevant for every aspect of this case. 1-PA186-189.

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). The Discovery Commissioner found that anonymity would impede Schieve and Hartung's ability to conduct discovery regarding the basis for his denials and affirmative defenses" and that "[w]ithout knowing John Doe's identity, Plaintiffs' ability to obtain discovery concerning these affirmative defenses is substantially impaired. They cannot fully explore the nature and extent of the relationship between John Doe and the

referenced third parties, nor can they fully explore the extent of his knowledge of the alleged unlawful acts." 1-PA-188. Further, as Schieve and Hartung allege punitive damages, information about John Doe would be relevant such as his "degree of reprehensibility." 1-PA-188.

John Doe argues that his participation in this case moots the need for discovery. Pet. 18. Not so. The judicial authority is clear that concealing a party's identity from the opposing party results in significant prejudice. *Wynn Resorts Ltd.*, 2022 WL 3214651, at *3 (D. Nev. Aug. 9, 2022) ("Plaintiffs' request to conceal their identities from Steve Wynn, the named perpetrator, and other non-parties, will greatly prejudice the defendants once discovery opens."). When anonymity is granted, it is usually *because* the identity of the party is known to the other party. *Doe v. Mozer*, No. 2:16-cv-00210-KJD-VCF, 2016 WL 3536857, at *1 (D. Nev. June 27, 2016) ("The Defendant knows the true identity of the Plaintiff, as shown by Defendant's subsequent filings using Plaintiff's name, and a pseudonym will not affect Defendant's procedural or discovery efforts."). The Subpoenas were not just served to add "John Doe" to the case, but 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.

John Doe's argument is frivolous, and this litigation cannot practicably move forward unless Schieve and Hartung can explore the claims and defenses at issue without being hampered by John Doe's anonymity.

## III. Under Any Balancing Test, Disclosure is Warranted.

The issue before the Court is limited to whether the district court correctly compelled the disclosure of John Doe's identity. That Schieve and Hartung are or were political figures does not automatically bring this case into the scope of the First Amendment. John Doe's assertion, made behind a veil of anonymity, that his actions were intended to investigate the conduct of elected officials does not automatically warrant First Amendment protection even if credited as true.

Nevada has not identified a definitive standard for when an anonymous speaker can resist discovery. *See e.g., 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.").

Under this, or any similar balancing test, there is no justification for concealing John Doe's identity. First, this matter involves non-expressive conduct – the installation of a GPS surveillance device via trespass – that does not warrant First Amendment protection. Moreover, John Doe denies having taken this action, so from his perspective, there is not even actual speech to protect. Second, even if John Doe has a First Amendment right to anonymity, this does not outweigh the need for Schieve and Hartung to obtain redress for the tortious invasion of their privacy. The identity of a defendant is relevant in this case. Schieve and Hartung 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.").

John Doe preposterously claims that his anonymous participation in the litigation is enough and that his identity is not relevant to the claims and defenses in this case. Without his identity, Schieve and Hartung cannot depose him, verify his statements, or conduct third-party discovery using his identity. No court has ever authorized such restrictions in similar circumstances.

Disclosure of anonymous speakers can be readily outweighed by competing interests. *Wirt v. Twitter, Inc.*, No. 21-MC-80166-JSC, 2021 WL 5919846, at *3 (N.D. Cal. Dec. 15, 2021) ("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] claim."). Similarly, Schieve and Hartung need John Doe's identity to pursue their claims and complete discovery and any minimal First Amendment privilege pales in comparison.

**A. The *Sony* Test**

The Discovery Commissioner analyzed John Doe's request for extraordinary relief under a number of different frameworks (as there was no direct authority on point supporting John Doe's request) and primarily relied upon the *Sony* test, which balances: (1) the plaintiff's concrete showing of a prime facie claim of copyright infringement; (2) the specificity of the plaintiff's discovery request; (3) the absence of alternative means to gain the information sought; (4) the plaintiff's need for the information to advance its claim; and (5) the defendants' expectation of privacy. *Sony Music Entm't, Inc. v. Does*, 1-40, 326 F. Supp. 2d 556, 565 (S.D.N.Y. 2004). Although trespass and invasion of privacy are not on all fours with copyright infringement, the similarity is primarily that these are conduct-based torts rather than speech-based torts like defamation. Each of these factors weighs in favor of disclosure as argued *supra*.

**B. The *Perry v. Schwarzenegger* Test**

John Doe argues that this Court should apply the test articulated in *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010). This framework is inapplicable. *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 at 1174. It also did not involve allegations that unidentified defendants engaged in tortious conduct against plaintiffs.

Under *Perry*, John Doe would have to make a "prima facie case of arguable First Amendment infringement" and then Schieve and Hartung would have to "demonstrate a sufficient need for the discovery to counterbalance that infringement." *Perry*, 591 F.3d at 1157. John Doe cannot even introduce evidence that his First Amendment rights are even implicated. *Diamond Pleasanton Enter., Inc. v. City of Pleasanton*, No. 12-cv-00254-WHO, 2015 WL 74946, at *1 (N.D. Cal. Jan. 5, 2015) ("Absent extraordinary circumstances, witnesses do not testify anonymously under our system of laws."). Accordingly, this Court cannot find that John Doe has a compelling interest in the First Amendment or his privacy because the Court had no competent evidence on which to base that determination.

**"**Where a party does not allege a risk of retaliatory harm (e.g., party asserts privacy in sensitive and highly personal matters), courts engage in a condensed analysis weighing: (1) the party's interest in anonymity, including the severity of any likely harm; (2) any prejudice to the opposing party; and (3) the public's interest." *Wynn Resorts Ltd*., 2022 WL 3214651, at *3. John Doe does not identify any harm that he would be exposed to by losing his anonymity except the same harm faced by every litigant who is sued for their own conduct.

John Doe relies heavily on *Tichinin v. City of Morgan Hill*, 99 Cal. Rptr. 661 (Ct. App. 2009). *Tichinin*, too, is an inapposite source that likewise identifies the clients and investigators by name. *Id.* at 668 (explaining that, after "Vierra authorized [his attorney, Tichinin] to hire a private investigator" to investigate whether the city manager and city attorney were romantically involved, "Tichinin hired Mark Bell, a licensed private investigator, to watch Tewes [the city manager] at an official conference he was planning to attend in Huntington Beach," and Bell "hired Brian Carey, who reserved a room" at the hotel Tewes stayed in Huntington Beach "in order to conduct surveillance"). As the Discovery Commission succinctly explained, the "*Tichinin* court did not hold that

tortious conduct is protected by the First Amendment" and "did not address the issue of whether a defendant who allegedly engaged in tortious conduct in the course of exercising his right to petition and to speak about matters of public interest has the right to remain anonymous during the litigation. Therefore, the Court finds that the holding in Tichinin is inapposite." 1-PA-201.

Under the second prong, the prejudice to Schieve and Hartung is immense because the shielding of John Doe's identity would eviscerate their ability to prosecute their civil case. John Doe 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.

**C. The *Highfield* Test**

John Doe alternatively claims that the two-part test from *Highfields Capital Mgmt., LP v. Doe,* 385 F. Supp. 2d 969 (N.D. Cal. 2005) should be applied. *Highfields* 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 compare the magnitude of the harms that would be caused to competing interests by ordering that the defendant's identity be disclosed. *Id.* *Highfields* is not truly applicable because it involved the merits of the plaintiff's claims, which have already been determined here and not are not challenged by John Doe.

John Doe simply states that Schieve and Hartung fail the first prong of *Highfields* because "Plaintiffs have no evidence that John Doe acted tortiously." Pet. 22. This is contrary to the substantive conclusions of the district court, which John Doe does not challenge here, that Schieve and Hartung have stated valid claims for relief. 1-PA-204. Indeed, the Discovery Commissioner noted that most of the factual conduct has already been admitted by John Doe. 1-PA-197.

With respect to the second prong of *Highfields*, John Doe claims that disclosure of his identity "irreparably harms" him for two purported

reasons. Pet. 23. The first is that "disclosing his identity does not further any legitimate litigation goal," Pet. 23, but this is not a harm suffered by John Doe and is incorrect in any event as shown *supra*. The second is that "John Doe's First Amendment interest in anonymously engaging in political activity would be irreparably harmed" and would have a "profound chilling effect on protected First Amendment activity." Pet. 23-24. Again, this comes back to the false premise presented by John Doe. John Doe has not identified any anonymous political activity that he engaged in other than hiring a private investigator to commit a tort. Just as his identity would not be protected if he hired a private investigator to break into a house, his identity merits no protection from committing unlawful surveillance upon Schieve and Hartung.

## CONCLUSION

For all the foregoing reasons, this Court should deny the extraordinary relief requested by John Doe, deny the request for a protective order, and finally permit this case to proceed through the disclosure of John Doe's identity to Schieve and Hartung, to the judicial system, and to the public.

DATED: October 29, 2024.

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## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the formatting, typeface and type style requirements of NRAP 32(a)(4-6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14-point, double-spaced Century Schoolbook font.

I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) and the Order Directing Answer because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 4,820 words.

I further certify that I have read this brief, that it is not frivolous or interposed for any improper purpose and that it complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e).

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

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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 October 29, 2024, I served the foregoing document on the parties in said case by electronically filing via the Court's e-filing system, and by serving a copy of the following parties by US Mail as follows:

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