IN THE SUPREME COURT
OF THE STATE OF NEVADA

Supreme Court Case No. 89277
District Court Case No. CV22-02015

JOHN DOE
Petitioner,

v.

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

And

HILLARY SCHIEVE, VAUGHN HARTUNG, DAVID MCNEELY, and 5 ALPHA INDUSTRIES, LLC.
Real Parties of Interest

PETITIONER JOHN DOE'S REPLY TO REAL PARTIES INTEREST'S ANSWER TO PETITION FOR WRIT OF PROHIBITION

Jeffrey F. Barr, Esq. (NV Bar No. 7269)
ASHCRAFT & BARR LLP
9205 W. Russell Road, Suite 240
Las Vegas, NV 89148
(702) 631-4755
barrj@ashcraftbarr.com
Attorneys for Petitioner

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I. RELIEF SOUGHT and ISSUES PRESENTED

A concerned citizen lawfully and anonymously hired a private investigator to investigate allegations of corruption of elected officials. The elected officials discovered the private investigator's legal surveillance and filed a lawsuit against both the investigator and the citizen. The First Amendment protects anonymous political conduct like lawfully hiring a private investigator to investigate elected officials.

Did the District Court err when it ordered the investigator to disclose the identity of the citizen, thus overruling the citizen's claim of First Amendment privilege?

The District Court has erroneously decided that John Doe has no First Amendment privilege and that John Doe's identity must be disclosed.

Petitioner John Doe thus respectfully requests that the Court issue a writ of prohibition directing the District Court (1) to vacate its order compelling disclosure of John Doe's identity and (2) to comply with further instructions protecting John Doe's identity during discovery and trial.

II. STANDARD OF REVIEW

Although this petition seeks relief from a discovery matter, this petition solely requires the Court to answer a legal question—whether Mr. Doe's identity is protected under the First Amendment. "Whether certain speech or activity is protected under the First Amendment is a question of law for the court." *Navratil v. City of Racine*, 101 F.4th 511, 519 (7th Cir. 2024). Questions of law, like the issue of constitutionality presented here, are reviewed de novo. Thus, this petition should be reviewed under a de novo standard.

Further, this Court should follow the Ninth Circuit's practice of reviewing matters of privilege de novo. *See Perry v. Schwarzenegger*, 591 F.3d 1147, 1159 (9th Cir. 2010) (The Ninth Circuit reviews any "determination of privilege" de novo). As discussed in *Perry*, "[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*." *Id.* at 1160 (emphasis in original). In that case, the Ninth Circuit reviewed de novo whether there was a First Amendment privilege to prevent disclosure of internal campaign communications. *Id.* at 1152.

The same de novo standard should apply here to determine whether John Doe is entitled to First Amendment privilege.

Despite the Ninth Circuit's clear holding that de novo review is appropriate here, Schieve and Hartung errantly urge this Court to stray from this standard, arguing that an abuse of discretion standard should apply because the matter of privilege is being asserted during discovery. This is an error and in derogation of this Court's holding in *Cotter v. Eighth Judicial Dist. Court in & for Cnty. of Clark*, 134 Nev. 247, 250, 416 P.3d 228, 232 (2018) ("when considering a writ petition, this court reviews legal questions de novo"). Because Schieve and Hartung agree that "[t]he issue before the Court is limited to whether the district court correctly compelled the disclosure of John Doe's identity," this Court should solely review this legal issue, giving no deference to the Discovery Commissioner's Recommendations and the District Court's Affirmance. [Answer at 17.]

III. SUMMARY OF ARGUMENT

John Doe should maintain his anonymity after being dragged into litigation for hiring a licensed investigator to look into alleged misconduct by Schieve and Hartung, who are elected officials. The Real Parties in

Interest's entire argument rests on the flawed premise that John Doe unlawfully surveilled them by placing a GPS device onto their cars. At this early stage of the litigation, however, there is no evidence that John Doe acted tortiously and or caused this GPS device to be installed on Schieve or Hartung's cars. There are only allegations which John Doe vehemently denies.

Indeed, the only actual conduct at issue here is John Doe's hiring of a licensed investigator to gather information about Plaintiffs' alleged misconduct, which is entirely lawful and protected conduct under the First Amendment. This fact moots many of the arguments made in the Answering Brief.

John Doe's conduct is protected by the First Amendment because it facilitated his right to engage in anonymous political conduct. It is well-established that the First Amendment protects anonymous speech. *See Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 200 (1999). Anonymity is important because it "is a shield from the tyranny of the majority." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995). So, too, the First Amendment protects anonymous conduct in furtherance of political activities. *See Talley v. California*, 362 U.S. 60,

65 (1960) ("anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent."). John Doe specifically hired the investigator, with the promise of anonymity, to investigate the political actions of his elected officials. This is protected political activity that will be burdened if his anonymity is sacrificed.

The test laid out in *Perry v. Schwarzenegger* for determining whether a first amendment privilege should apply here. 591 F.3d 1147 (9th Cir. 2010). This test is on point because it specifically applies to claims of First Amendment privilege. Because John Doe has demonstrated a prima facie showing of First Amendment infringement and Plaintiffs do not have a need for John Doe's identity that is "highly relevant" to their claims or defenses, John Doe is entitled to a First Amendment privilege under the *Perry* test.

Regardless of the balancing test used, though, John Doe's claim of privilege under the First Amendment should prevail. While Plaintiffs have no specific need to reveal John Doe's identity, the harm to John Doe in losing his anonymity is irreparable. Accordingly, for the reasons detailed below, the Court should issue a writ of mandamus or prohibition prohibiting the disclosure of John Doe's identity.

IV. ARGUMENT

A. The First Amendment Protects John Doe's Hiring of a Licensed Investigator.

John Doe's anonymous hiring of a licensed investigator implicates the First Amendment because he did so in furtherance of his right to speak and petition. The Answering Brief's overstatement of John Doe's conduct in this case leads them to erroneously conclude otherwise [Answer at 7.] But this is a red herring—imputing Investigator Defendants' alleged conduct to John Doe—to argue that John Doe's activity was unprotected by the First Amendment. This is misleading because there is no evidence that John Doe ever engaged in "unlawful and tortious surveillance." The activity he did engage in, anonymously hiring a licensed investigator to investigate claims of political misconduct, is an activity protected by the First Amendment.

Likewise, Schieve and Hartung err in characterizing John Doe's activity as non-speech conduct. In their answer, Real Parties in Interest wrongly accuse John Doe of "surreptitiously causing a GPS tracker to be installed on Schieve and Hartung's private vehicles and violating their privacy rights." [Answer at 11.] But Doe never caused the GPS tracker to be installed on Real Parties in Interests' cars, nor is there evidence

that he authorized his personal investigator to do so. To the contrary, John Doe's involvement in this case begins and ends with him lawfully hiring a personal investigator to inquire into elected officials' alleged misconduct. This is political activity protected by the First Amendment, and this is the action for which John Doe seeks anonymity.

Given these facts, the Real Parties In Interests' argument falls apart. They overstate that a Ninth Circuit holding in *Dietemann v. Time, Inc.* "forecloses" John Doe's argument that his conduct is protected by the First Amendment. *Dietemann v. Time, Inc.*, 449 F.2d 245, 250 (9th Cir. 1971). [Answer at 12.] Unlike this case, *Dietemann* involved a Defendant who invoked the First Amendment as a defense to an invasion of privacy claim after he deceitfully entered plaintiff's home to photograph and record the plaintiff. *Id.* at 245-246. Here, in contrast to *Dietemann*, John Doe did not personally engage in a tort, and likewise did not "encourage conduct" that "grossly offends ordinary men." *Id.* at 245. John Doe claims a First Amendment privilege for the only act he was responsible for—anonymously hiring a licensed investigator to verify whether or not his elected officials were engaged in misconduct. Thus, John Doe should be

entitled to protection under the First Amendment for this step taken in furtherance of his right to speak and petition.

Schieve and Hartung mischaracterize John Doe's argument throughout the entirety of their answer. For example, Plaintiffs cite to *Zemel v. Rusk* for the general proposition that "[t]he right to speak and publish does not carry with it the unrestrained right to gather information." *Zemel v. Rusk*, 381 U.S. 1, 17 (1965). Again, this proposition is undisputed. John Doe's argument is not that he has an unrestrained right to gather information, but that anonymously and lawfully hiring a licensed investigator as a first step to petition his elected officials is well within his First Amendment right. Moreover, in contrast to the issue here, the right at issue in *Zemel* was the right to travel internationally in furtherance of the newsgathering. *See id.* at 13-14. Unlike this case, the right to travel internationally to gather information implicates concerns about foreign policy, national security, and executive power. *See id.* at 6. These concerns are not present here. John Doe's argument is much more straightforward—he should be able to preserve his anonymity in this lawsuit where the only action he took was lawfully

hiring a licensed investigator to gather information about Schieve and Hartung's political activities.

Further, John Doe could not have foreseen how the Investigator Defendants would conduct their investigation. Real Parties in Interest inappositely cite a case where a defendant was not allowed to proceed under pseudonym after he "organized the protest such that he knew, or should have known that violence would likely ensue," and "arranged for the protesters to meet." *Doe v. McKesson*, No. 17-30864, 2023 WL 4044558, at *17 n. 12 (5th Cir. June 16, 2023). The facts in that case could not be further from the facts presented here where John Doe had absolutely no control over the conduct of Investigator Defendants. There is no evidence that John Doe ratified, encouraged, or even had knowledge about the Investigator Defendant's surveillance methods. Because John Doe had no control or knowledge about what the Investigator Defendants' investigation would entail, he should not lose his privilege under the First Amendment.

Even considering the fact that John Doe was not involved in the Investigator Defendant's investigation, it is unclear that installing GPS trackers on Schieve and Hartung's cars to track their movement on public

streets was actually unlawful at the time the alleged events took place. There was not a statute prohibiting the same until July 1, 2023. NRS 200.930; *see also* Assemb. B. 356, 2023 Leg., 82d Sess. (Nev. 2023). Moreover, Real Parties in Interest inappositely cite caselaw that is at odds with post-*Jones* decisions in which courts have held that the placement of a GPS device on a vehicle is not a per se intrusion upon seclusion. *See, e.g., Moran v. Lewis*, 114 N.E.2d 1254, 1256 (Neb. 2018) (finding allegations that a private citizen installed a GPS tracking device on an individual's motor vehicle to track its movement on public roads insufficient to establish a cause of action for invasion of privacy); *Troeckler v. Zeiser*, 2015 WL 1042187, *7 (S.D. Ill. Mar. 5, 2015) (finding plaintiffs "failed to plead how a passerby on the street or an individual in another vehicle could not capture the same information that the tracking device captured and thus failed to plead the disclosure of a private fact."). Here, Real Parties in Interest allege the same, and thus it is unclear that the alleged installation was "recognized tortious conduct." [Answer at 14.] This lack of clarity is not sufficient to invalidate John Doe's First Amendment privilege.

Unlike the aforementioned cases, John Doe's position is rather uncomplicated. Hiring an investigator to investigate allegations of misconduct by public officials is conduct that is entitled to protection pursuant to the First Amendment. *See Tichinin v. City of Morgan Hill*, 117 Cal. App.4th 1049, 1056 (2009). The facts in *Tichinin* are very similar to those presented here. In *Tichinin*, a local attorney hired an investigator on behalf of a client to look into a rumor circulating in Morgan Hill that the city manager and city attorney were having an affair. *Id.* The court considered whether hiring a private investigator was protected activity under the First Amendment. *Id.* at 1074. The court reasoned that "it [is] obvious that restricting, enjoining, or penalizing prelitigation investigation could substantially interfere with and thus burden the effective exercise of one's right to petition." *Id.* at 1069. Thus, the court concluded that hiring a private investigator "can also be considered protected under the right of free speech." *Id.* at 1074. This is the same right at the heart of this case. Similarly, John Doe's right to investigate political misconduct will be burdened if he is forced to reveal his identity through litigation, thereby exposing him to future retaliation.

Not only does John Doe have a right to hire a licensed investigator to investigate potential misconduct, but he also has the right to remain anonymous under the First Amendment. The First Amendment protects a diverse array of anonymous political activities. The First Amendment protects against the disclosure of associational memberships absent a compelling state interest. *NAACP v. Alabama*, 357 U.S. 449 (1958); *accord Int'l Bhd. Of Teamsters, Airline Div. v. Allegiant Travel Co.*, No. 2:14-CV-00043-APG, 2014 WL 6069851, at *8 (D. Nev. Nov. 12, 2014). The First Amendment protects the right to distribute anonymous campaign literature. *McIntyre*, 514 U.S. 334 (1995); *accord Am. C.L. Union of Nevada v. Heller*, 378 F.3d 979, 981 (9th Cir. 2004). The First Amendment protects the right to publish and distribute anonymous handbills. *Talley*, 362 U.S. 60 (1960). The First Amendment protects the right to anonymous political canvassing. *See Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. Of Stratton*, 536 U.S. 150, 166 (2002). The First Amendment protects the right of individuals to anonymously donate to charitable organizations. *See Americans for Prosperity Found. v. Bonta*, 594 U.S. 595, 616 (2021) (holding that a regulation requiring

tax-exempt charities to identify every major donor "creates an unnecessary risk of chilling").

Given the aforementioned line of cases establishing the importance of anonymity in political conduct, the anonymous political conduct here is likewise entitled to protection under the First Amendment.

B. John Doe's First Amendment Interest Outweighs the Plaintiffs' Need for Discovery.

(1) The Perry Test Applies and Favors John Doe's Claim of Privilege Under the First Amendment.

The test set out in *Perry v. Schwarzenegger* applies here. *See Perry*, 591 F.3d at 1160. Unlike the other tests discussed, the *Perry* test is the most fitting for determining whether a First Amendment-specific privilege applies.

The *Perry* test, as applied, favors John Doe's claim of First Amendment privilege. "In this circuit, a claim of First Amendment privilege is subject to a two-part framework." *Id.* First, the party asserting the privilege must demonstrate a "prima facie showing of arguable first amendment infringement." *Id.* (quotations omitted). Second, if the proponent makes this showing, "the evidentiary burden shifts" and the party seeking discovery must "demonstrate a sufficient

need for the discovery to counterbalance that infringement." *Id.* at 1164. The party seeking discovery must establish that the information sought is not only relevant under the discovery standards set out in Fed. R. Civ. P. 26(b)(1) and NRCP 26(b)(1), but also "'highly relevant' to the claims or defenses." *Id.*

Here, John Doe has made a prima facie showing that losing his anonymity in this lawsuit will infringe upon his First Amendment rights. On the other hand, Real Parties in Interest have not met their burden of showing that John Doe's identity is "highly relevant" to their claims or defenses. Under this analysis, the balance weighs in favor of John Doe preserving his anonymity.

Schieve and Hartung's purported need for discovering John Doe's identity falls short of the requirement that the need be "highly relevant" to their claims. For example, they claim that they "cannot depose him, verify his statements, or conduct third-party discovery using his identity." [Answer at 19.] But courts allow parties to proceed pseudonymously all the time, and discovery can be conducted accordingly with proper procedures to protect John Doe's identity. Their claims of

inconvenience are not unique to any other case where a party proceeds under pseudonym.

Further, Schieve and Hartung's citations explain why courts rarely allow *plaintiffs* to proceed pseudonymously, but those cases carry little weight here. While courts generally do not allow plaintiffs to both avail themselves in a civil lawsuit and remain anonymous, the same is not true for Defendants. For example, in *Doe No. 1 v. Wynn Resorts Ltd.*, No. 2:19-cv-01904-GMN-VCF, 2022 WL 3214651 (D. Nev. Aug. 9, 2022), the *plaintiffs* moved for leave to proceed under fictitious names. *Id.* at *1. Here, by contrast, John Doe has not purposely availed himself of the legal system; Schieve and Hartung haled him into court. Schieve and Hartung should not then be permitted to use discovery to reveal John Doe's identity in derogation of his First Amendment rights.

Finally, the First Amendment harm here is clear—John Doe's right to engage in anonymous political activity will be infringed, and he will be exposed to potential retaliation by Schieve and Hartung. This harm is irreparable and greater than that suffered by the average defendant.

(2) *Regardless of the Balancing Test, John Doe's Identity Should Remain Privileged.*

Real Parties in Interest erroneously urge this Court to analyze John Doe's claim of privilege under the *Sony* test, but this test is not specific to claims of First Amendment privilege, unlike the *Perry* test. *Sony Music Entm't, Inc. v. Does, 1-40*, 326 F. Supp. 2d 556, 565 (S.D.N.Y. 2004) (weighing the need for discovery in a copyright case).

While the Court should apply the *Perry* test, as it more directly applies in this case, the type of balancing test is mere form. The substance of the analysis is the same. All of the balancing tests essentially balance: (1) whether discovery is relevant to the proponent's claims and defenses and (2) whether the proponent's interest in discovery outweighs the constitutional injury.

Schieve and Hartung's reasons for discovering John Doe's identity are not relevant to their specific claims or defenses, while the comparative harm to John Doe is significant and irreparable. The form of the balancing test does not change this analysis. Thus, this Court should issue a writ prohibiting the discovery of John Doe's identity.

Like other concerned citizens, John Doe has the right to speak out and petition his government. In this case, John Doe began the process

by taking reasonable steps to ensure the allegations of misconduct made against Real Parties in Interest were true before taking further steps. He acted completely lawfully in hiring an investigator to conduct this investigation, and he had no control over how that investigation was done.

Now, these elected officials seek to use the judicial process to penalize John Doe for his constitutional actions, even though he was well within his right to hire an investigator. If John Doe loses anonymity, he will be exposed to further retaliation by Plaintiffs.

John Doe is not the only individual whose right is at stake in this lawsuit. If John Doe loses his anonymity, the free speech rights of those engaged in political investigation will be chilled. Surely, individuals will hesitate before investigating their political officials if they will be outed during litigation and exposed to retaliation by those officials. For the aforementioned reasons, this Court should issue a writ of mandamus or prohibition to preserve John Doe's anonymity.

V. CONCLUSION

John Doe enjoys the right to engage in anonymous political conduct. The Court should assess this matter through the lens of the

test set out in *Perry v. Schwarzenegger*, and the outcome is unequivocal: The Court must issue an order protecting John Doe's identity from discovery. Anything less would chill and irreparably damage John Doe's First Amendment right to anonymously engage in political conduct.

DATED this 17th of December 2024.

/s/ Jeffrey F Barr

Jeffrey F. Barr, Esq. (NV Bar No. 7269)
ASHCRAFT & BARR LLP
9205 W. Russell Road, Suite 240
Las Vegas, NV 89148
(702) 631-4755
barrj@ashcraftbarr.com
Attorneys for Petitioner

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because the Petition has been prepared in a proportionally space typeface (14-point Century Schoolbook font).

I further certify that this brief complies with the page– or type–volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is 3,352 words pursuant to NRAP 21(d).

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

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

DATED this 17th of December 2024.

/s/ Jeffrey F. Barr

Jeffrey F. Barr, Esq. (NV Bar No. 7269)
ASHCRAFT & BARR LLP
9205 W. Russell Road, Suite 240
Las Vegas, NV 89148
(702) 631-4755
barrj@ashcraftbarr.com
Attorneys for Petitioner

CERTIFICATE OF SERVICE

On this 17th day of December 2024 **PETITIONER JOHN DOE'S REPLY TO ANSWER TO PETITION FOR WRIT OF PROHIBITION** was filed electronically with the Clerk of the Nevada Supreme Court, and a copy of the Petition was served to the persons shown below via e-mail and, if necessary, by US Mail.

The Honorable David A. Hardy
Second Judicial District Court
Department No. 15
75 Court Street
Reno, Nevada 89501
Carrie.lipparelli@washoecourts.us
Respondent

Adam Hosmer-Henner, Esq.
Chelsea Latino, Esq.
Philip Mannelly, Esq.
Jane Susskind, Esq.
MCDONALD CARANO LLP
100 West Liberty Street, Tenth Floor
Reno, Nevada 89501
ahosmerhenner@mcdonaldcarano.com
pmannelly@mcdonaldcarno.com
jsusskind@mcdonaldcarano.com
Attorneys for Real Parties in Interest Hillary Schieve and Vaugh Hartung

Ryan T. Gormley, Esq.
Brittany M. Llewellyn, Esq.
WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
rgormley@wwhgd.com
bllewellyn@wwhgd.com
Attorneys for Real Parties in Interest David McNeely and 5 Alpha Industries LLC

/s/ Jeffrey Barr
An Employee of Ashcraft Barr LLP