No. 24-___

In the Supreme Court of the United States

JOHN DOE,

Petitioner,

v.

THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, COUNTY OF WASHOE; AND THE HONORABLE DAVID A. HARDY, DISTRICT JUDGE,

Respondents

and

HILLARY SCHIEVE; VAUGHN HARTUNG; DAVID NEELY; AND 5 ALPHA INDUSTRIES, LLC

Real Parties in Interest.

On Petition for a Writ of Certiorari to the Nevada Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

John Doe conducted an anonymous investigation of public figures based on concerns about corruption. Two elected officials, including the Mayor of Reno, the target of the investigation, sought to use litigation to unmask John Doe. The Nevada Supreme Court refused to apply the First Amendment to the investigation, declaring that the speech preparations were "non expressive" and "not subject to First Amendment protection."

The question presented is:

> Are speech preparatory investigations expressive and subject to First Amendment protection?

PARTIES TO THE PROCEEDINGS

The applicant John Doe (defendant-appellant below) is an individual resident of Washoe Count, Nevada.

The respondent is the Second Judiciary District Court of the State of Nevade in and for the County of Washoe and the Honorable David A. Hardy, District Court Judge.

The Real Parties in Interest (plaintiffs below) are Hillary Schieve, Mayor of Reno Nevada, and Vaughn Hartung, former Chair of the Washoe County Board of Commissioners.

LIST OF ALL PROCEEDINGS

Supreme Court of Nevada, No. 86559, *McNeely v. Second Judicial District Court*, order entered April 15, 2024.

Second Judicial District Court of State of Nevada, No. CV22-02015, *Schieve v. McNeely*, order entered August 8, 2024.

Supreme Court of Nevada, No. 89277, *Doe v. Second Judicial District Court*, order entered April 9, 2025.

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JURISDICTION

The Nevada Supreme Court denied John Doe's petition for a Writ of Prohibition on April 9, 2025. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution, U.S. Const. amend. I, provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part, that "No State shall … deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, § 1.

INTRODUCTION

The Nevada Supreme Court has made political speech based on investigations a First Amendment free zone. The Constitution demands more. John Doe, part of an increasing trend of citizen journalism and political activism, sought to investigate serious concerns of political corruption in order to engage in core political speech. He did so carefully to protect his identity and avoid harassment and reprisals for criticizing elected officials. Unfortunately, just as he feared, the subjects of his political speech have sought to expose his identity in a state court unmasking lawsuit. The First Amendment protects political speech and the precursor expressive activity that is necessary to engage in political speech.

Precisely how the First Amendment applies to the right to engage in political speech or journalism anonymously continues to develop in lower courts throughout the country. Before courts can correctly apply the First Amendment to this increasing form of speech, however, courts must agree that the First Amendment applies to speech-facilitating activity. This case presents an ideal vehicle for this Court to answer the fundamental question of whether the First Amendment applies to these activities. Logically, this is the practical first step in the judicial development of investigative speech making cases.

The Nevada Supreme Court split from numerous Circuits and the best understanding of this Court's precedent when it found the First Amendment does not apply to investigative reporting activities. That cannot be right. This Court should grant certiorari and provide clarity on this critical issue, or in the alternative, summarily reverse the Nevada Supreme

Court and thus affirm the First Amendment protections for John Doe's vital political speech activity.

STATEMENT OF THE CASE

This case arises from a Complaint filed in the Second Judicial District of Nevada against David McNeely, 5 Alpha Industries, and John Doe on December 15, 2022, and amended on February 23, 2023. The Amended Complaint alleges that McNeely, a private investigator, and his company 5 Alpha were hired by John Doe to track the Plaintiffs, Hillary Schieve and Vaughn Hartung. At the time of the alleged surveillance, Schieve was the mayor of Reno, Nevada and Hartung the Chair of the Washoe County Board of Commissioners. John Doe has since represented to the Nevada Courts that he hired McNeely to investigate allegations of corruption involving Schieve and Hartung. *See* Doe Declaration at ¶9.

The Complaint alleges that McNeely installed GPS tracking devices on the Plaintiffs' vehicles and captured photographs of Schieve.[1] The licensed

[1] At the time of the alleged conduct, it was not unlawful in Nevada to install GPS trackers on another person's vehicle without their consent. *See Ringelberg v. Vanguard Integrity Prof'ls-Nev., Inc.*, No. 2:17-cv-01788-JAD-PAL, 2018 WL 6308737, at *9 (D. Nev. Dec. 3, 2018); *See* Nev Rev. Stat. § 200.930 (passed in 2023, after the alleged conduct at issue). The district court in this case held that plaintiffs may bring an invasion of privacy claim based on the GPS tracking, but it is not clear that installation of the GPS was tortious; the Discovery Commissioner called it "arguable." *See* Discovery Commissioner's Recommendation at 15. GPS tracking devices are legal to use as a matter of state law in roughly half the States with the other half regulating the devices. See National Conference of State Legislatures, *Private Use of Location Tracking Devises: State Statutes*, Sept. 13, 2022, https://www.ncsl.org/technology-and-communication/private-use-of-location-tracking-devices-state-statutes

private investigator was acting on Doe's non-specific direction to investigate concerns about public corruption. It further alleges that Doe and McNeely published and disseminated information about Schieve and Hartung's travels and published and disseminated photographs of Schieve. App. 49a–54a, Amended Compl. at 2. For his part, Doe has represented that he never received any of the information from the tracking investigation.

The Complaint brought eight causes of action: (1) Invasion of Privacy by Intrusion upon Seclusion; (2) Invasion of Privacy by Public Disclosure of Private Facts; (3) Violation of a Nevada statute prohibiting certain publications of personal identifying information; (4) Negligence; (5) Trespass; (6) Civil Conspiracy; (7) Aiding and Abetting; and (8) a claim for Declaratory Relief. The third, fourth, and eighth claim were subsequently dismissed following a motion from McNeely.

Along with the Complaint, Plaintiffs sought a subpoena ordering McNeely and 5 Alpha to disclose John Doe's identity. On May 4, 2023, the district court granted the request and ordered McNeely and Alpha 5 to disclose John Doe's identity. The next day, Doe appeared in the case and filed a motion for summary judgment. On May 12, 2023, McNeely and Alpha 5 filed a Petition for a Writ of Prohibition in the Nevada Supreme Court, arguing that John Doe's identity was protected as a trade secret and invoking an investigator-client privilege. The Nevada Supreme Court denied that petition.

When the case returned to the district court, Doe filed a Motion for a Protective Order preventing the disclosure of his identity. In his motion, he argued

that the First Amendment protected his right to engage in anonymous expressive activity. The motion was referred to a discovery commissioner, who issued a recommendation that the district court deny the motion. The district court adopted the recommendation but noted that it was "inclined to grant a stay of proceedings pursuant to [Nevada Rule of Appellate procedure] 8 if Mr. McNeely or John Doe chooses to pursue extraordinary relief through a petition for writ of mandamus or prohibition." App 3a, Order Affirming Discovery Commissioner's Recommendation at 2 n.1. John Doe filed a Petition for a Writ of Prohibition in the Nevada Supreme Court, once again arguing that compelled disclosure of his identity without a showing of need from the plaintiffs violated the First Amendment.

The Nevada Supreme Court disposed of Doe's Petition the day after oral argument in a one-paragraph order that reads, in its entirety:

> This original petition for a writ of prohibition challenges a district court pretrial discovery order. "Petitioners carry the burden of demonstrating that extraordinary relief is warranted." *Pan v. Eighth Jud. Dist. Ct.*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004). We conclude that the conduct at issue was non-expressive in nature and not subject to First Amendment protection. For this reason, the district court did not abuse its discretion in affirming the discovery commissioner's recommendation.

App 47a, *Doe v. Second Jud. Dist. Ct. in & for Cnty. of Washoe*, 566 P.3d 570 (Nev. 2025). The Nevada Supreme Court did not explain how it reached the

conclusion that Doe's newsgathering and publications were "non-expressive." Doe brings this certiorari petition challenging the final denial of his writ of prohibition.

SUMMARY OF THE ARGUMENT

The Nevada Supreme Court held that a citizen-journalist who allegedly investigated local political corruption engaged in "non-expressive" conduct. Faced with a defendant claiming a First Amendment right to be anonymous, most courts would have engaged in a careful balancing of free speech interests against the needs of the litigants for discovery, seeking to avoid unmasking an anonymous speaker on the basis of unsubstantiated allegations. *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). The Nevada Supreme Court dispensed with these protections and stripped John Doe of his First Amendment rights in a curt one-paragraph order.

Despite the fact that Doe is being sued for investigating and publishing information about two elected officials, the Nevada Supreme Court held that the First Amendment does not apply. It did not grapple with First Amendment protections for publishing, First Amendment protections for newsgathering, or protections for defendants sued for their expressive conduct. See *Talley v. California*, 362 U.S. 60, 64–65 (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 First Amendment); *Tichinin v. City of Morgan Hill*, 99 Cal. Rptr. 3d 661, 678 (2009) (hiring investigator to investigate allegations of misconduct by public officials is conduct protected by the First Amendment.) The Nevada Supreme Court's failure to engage with these fundamental First Amendment protections is serious legal error warranting summary reversal.

Even if the First Amendment does not ultimately shield Doe from liability, after careful examination under exacting scrutiny (or even intermediate scrutiny), it still plays an important role in evaluating his defenses and deciding whether to unmask him. By refusing to follow the First Amendment and consider protection of John Doe's investigative activity, the Nevada Supreme Court not only made an error of law, it deprived John Doe of his constitutional right to proceed anonymously in a case where he is being sued for his expression.

Citizen journalists and concerned political dissidents increasingly rely on anonymous or furtive investigative techniques in order to gather information to speak on matters of public concern. John Doe used a private investigator who attempted to record public location information. Other speakers like him have used secretive recordings, audio or visual, in efforts to expose matters of great political importance. This is part and parcel of the modern political moment, particularly in local matters like those Doe was preparing to speak on where citizen journalists are increasingly filling a void left by the closure and consolidation of local newspapers. Precisely because they are typically

not attached to established news organizations and often have occupations outside their journalistic activity, these citizen journalists are, l particularly susceptible to political pressure to remain silent.

The First Amendment stands in defense of political speech and anonymity in large part because the Founders understood the importance of robust public exchange of ideas that did not turn on the identity of the speaker. The Nevada Supreme Court broke with this tradition and many other courts in finding that the First Amendment provides no protection whatsoever for investigative efforts that are the precursor to speech on matters of political import. The First Amendment does indeed protect expressive conduct in the form of anonymous investigations and this Court should say so.

REASONS FOR GRANTING THE PETITION

I. The Nevada Supreme Court Refused to Apply the First Amendment to Important Investigative Expressive Conduct

The First Amendment applies to the literal act of speaking and those activities necessary to create speech, including investigative information gathering. While questions of how the First Amendment protects information gathering continue to develop below, *Project Veritas v. Schmidt*, 125 F.4th 929 (9th Cir. En banc 2025), cert. pending No. 24-1061 (U.S.), there should be no doubt that the First Amendment applies to information gathering. The Nevada Supreme Court wrongly refused to even consider the First Amendment's application to the anonymous investigation John Doe pursued against two public figures. It is an important and recurring question of First Amendment application to political speech that this Court should protect.

A. John Doe's Alleged Conduct and Publication Were Expressive

John Doe's anonymous engagement of a private investigator to assist him in gathering news regarding the conduct of local officials is consistent with a long tradition of undercover and anonymous newsgathering in the United States. As local journalism has atrophied over the last twenty years, it is critically important that citizen journalists like John Doe are protected in undertaking this work. The Nevada Supreme Court's bald assertion that John Doe's activity is not even worthy of analysis under the First Amendment runs flatly contrary to this established tradition

and ignores the implications for the First Amendment and newsgathering regarding local matters.

1.Undercover and anonymous newsgathering by citizen journalists is increasingly common and critical to public awareness, particularly in the context of local politics. Undercover investigations have been a time-honored tradition of American journalism. Indeed, undercover newsgathering has resulted in important and sometimes history-making reporting. For example, abolitionist activists and Northern journalists reported on conditions of Southern slaves by concealing their identities and purpose in observing the slaves' circumstances. One such undercover journalist documented—in horrific detail—the sale of hundreds of black men, women, children, and infants near Savannah, Georgia, in 1859, for the New York Tribune. That undercover reporter's true name was Mortimer Thompson. He concealed his identity and wrote under a pen name, "Q.K. Philader Doe-sticks," in order to preserve his anonymity during his investigation. He described for his readers why he needed to remain anonymous at the time of his newsgathering and the means by which he did so:

> Your correspondent was present at an early date, but as he easily anticipated the touching welcome that would, at such time, be officiously extended to a representative of The Tribune … and not desiring to be the recipient of a public demonstration from the enthusiastic Southern populations … he did not placard his mission and claim his honors. Although he kept his business in the background, he made himself a prominent figure

> in the picture, and, wherever there was anything going on, there was he in the midst.

Brooke Kroeger, *Undercover Reporting, The Truth About Deception* at 24 (2012).

Another journalist likewise went undercover to report on the execution of John Brown, who was the prominent abolitionist who advocated for armed insurrection to free slaves. New York Tribune journalist Henry Olcott reported anonymously as a member of the Petersburg Grays which was the regiment sent to guard Brown's body. *See* Sarah Belle Dougherty, *Remembering Henry S. Olcott,* The Theosophical Society, https://www.theosophical.org/component/content/article/65-about-us-sp-709/olcott/1857-remembering-hs-olcott.

After Reconstruction, journalists used similar methods to report on industry. In the late 1800s, a journalist named Elizabeth Jane Cochran, working under the pen name Nellie Bly, routinely used false identities to gain access to institutions and businesses engaged in unlawful activity. *See generally* Brooke Kroeger, *Nellie Bly: Daredevil, Reporter*, *Feminist* (1994). She produced an exposé about Blackwell's Island Insane Asylum for women by pretending to be a mentally ill person. This anonymizing reporting uncovered the horrors of abusive staff, fire hazards, unsanitary practices, poor food, and other misconduct. Nellie Bly, *Ten Days in a Mad-House* (1887).

At the turn of the 20th century, written eyewitness accounts of the meatpacking industry, including Upton Sinclair's novel The Jungle (1906) and other reports on the meatpacking industry sparked a nationwide debate that helped bring about new regulations

to protect public health and worker safety. Karen Olsson, *Welcome to The Jungle*, Slate (July 10, 2006). Sinclair himself engaged in this speech by spending weeks undercover in Chicago's meatpacking plants. This investigation and speech on a matter of public concern produced a legal response. *See* Meat Inspection Act, Pub. L. No. 59-242, 34 Stat. 1260 (1907) (codified as amended at 21 U.S.C. §§ 601–695), and the Pure Food and Drug Act, Pub. L. No. 59-384, 34 Stat. 768 (1906) (codified as amended at 21 U.S.C. §§ 301–399f).

Due to advances in technology, the modern-day Upton Sinclair, Nellie Bly, or Mortimer Thompson would not conduct his investigation relying solely on written notes based on memory and transcribing them into written work. Today, his or her preferred publication medium would likely be the internet and he or she would likely be a citizen journalist gathering news without the support of a large newspaper or publishing house. Modern day investigative journalists might even use a private investigator to look into the movements of a subject of his investigation. For example, in 2021, the then-startup website The Pillar, contracted with investigators and data experts to review anonymized location data from users of Grindr—a "hookup" app—to demonstrate that a cell phone owned by a prominent American priest was regularly on the app near his home and while travelling on business for the U.S. Conference of Catholic Bishops. *See* Madeline Carlisle, Time Magazine, *How the Alleged Outing of a Catholic Priest Shows the Sorry State of Data Privacy in America*, July 23, 2021.

Indeed, thanks to the collapse in local newspapers, this sort of reporting is certain to be increasingly

relevant to American's knowledge of local political matters. By 2019, over 65 million Americans lived in a county with only one local newspaper, or no local newspaper at all. Clara Hendricks, Brookings, *Local journalism in crisis: Why America must revive its local newsrooms*, Nov. 12, 2019. This trend has accelerated in the 2020s with an average of two local newspapers closing per week. Social media and independent digital websites overwhelmingly reliant on citizen journalists are the only area of growth in local newsgathering. The value of anonymity for citizens reporting and commenting online regarding matters of local public import online been acknowledged even by established publishers who benefit from active forums adjacent to their publications.

2.Undercover and anonymous newsgathering by citizen journalists like that of John Doe here is expressive. Against this long and increasingly vital tradition of anonymous and undercover newsgathering, the Nevada Supreme Court—in a single sentence—concluded that John Doe's newsgathering and publication activities were "non-expressive in nature and not subject to First Amendment protection." *Doe*, 566 P.3d 570. This is plainly incorrect; the First Amendment extends to the creation of speech before its publication. Even ignoring the publication activities alleged in the Complaint—the Second Cause of Action in the Complaint against Doe is for "Public Disclosure of Private Facts." App. 56a, Amended Compl. at 6.— Doe's newsgathering activities were expressive.

Inherent in the First Amendment's guarantee of freedom of speech is a guarantee of freedom to create speech. That is why "news gathering is not without its First Amendment protections." *Branzburg v. Hayes*,

408 U.S. 665, 707 (1972). "[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated,' *id.* at 681, because "the State could effectively control or suppress speech by the simple expedient of restricting an early step in the speech process rather than the end result." *Am. Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 597 (7th Cir. 2012). To fully protect the right to publish stories about political corruption, the Constitution must protect the right to investigate that corruption. A journalist with no access to a pen, paper, or sources is no journalist at all. Two lines of precedent from this Court demonstrate that John Doe's newsgathering activity was expressive.

First, cases extending First Amendment protection speech-creation activities show that Doe's investigation was expressive separate and apart from any publication of the investigation's results. This Court has held it unconstitutional to levy special taxes on newspaper ink, *Minneapolis Star & Trib. Co. v. Minnesota Com'r of Revenue*, 460 U.S. 575 (1983), or impose financial disincentives to create certain kinds of written work, *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991), because these laws indirectly burden expression. In *Minneapolis Star*, the Court struck down Minnesota's tax on ink and paper used in publication because it restrict[ed] unduly the exercise of rights protected by the First Amendment." 460 U.S. at 592. The law did not regulate or prohibit speech in any fashion, but it made it more burdensome for newspapers to create their product.

Similarly, in *Simon & Schuster* the Court addressed a statute that required any person

contracting with a criminal for a depiction of their crime to turn over any proceeds under the contract to the state of New York. The law was enacted after Son of Sam killer David Berkowitz was able to profit off the media rights to his story. The Court struck down the statute as a content-based restriction on speech even though the law didn't restrict speech at all, it only reduced its profitability.

Taken together, *Minneapolis Star* and *Simon & Schuster* stand for the proposition that the First Amendment's protections extend beyond speech into speech creation. Outright prohibition on speech is only the bluntest of the government's weapons and the First Amendment also guards against subtler attacks like taxing ink or wielding tort law against those who investigate the government. At least seven circuits—including the Ninth Circuit—have applied the principles of Minneapolis Star and Simon & Schuster to conclude that the First Amendment protects speech-creation apart from speech. *See Project Veritas v. Schmidt*, 125 F.4th 929, 943 (9th Cir. 2025), cert. pending No. 24-1061 (U.S.); *People for the Ethical Treatment of Animals, Inc. v. N. Carolina Farm Bureau Fed'n, Inc.*, 60 F.4th 815, 822 (4th Cir. 2023), cert. denied, 144 S. Ct. 325, (2023); *W. Watersheds Project v. Michael*, 869 F.3d 1189, 1195–96 (10th Cir. 2017); *Fields v. City of Philadelphia.*, 862 F.3d 353, 358 (3d Cir. 2017); *Turner v. Lieu-tenant Driver*, 848 F.3d 678, 689 (5th Cir. 2017); *Buehrle v. City of Key W.*, 813 F.3d 973, 977 (11th Cir. 2015); *Alvarez*, 679 F.3d at 595; *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011).

Second, this Court recognized a First Amendment interest in investigative materials in *Branzburg v. Hayes*, 408 U.S. 665, 701 (1972). There, the Court

rejected an argument that would have granted journalists a limited privilege in criminal grand jury proceedings, but both Justice White's majority and Justice Powell's concurrence noted that grand jury subpoenas for journalistic materials do, in fact, impose on legitimate First Amendment interests. *See* 408 U.S. at 707 (White, J., majority), 709–10 (Powell. J, concurring). The Court ultimately held that the needs of a legitimate criminal grand jury trump a journalist's First Amendment interest in his investigative materials, but it acknowledged the legitimacy of the interest.

Extending the reasoning of *Branzburg*, a strong majority of Circuit Courts have held that journalists enjoy a limited First Amendment privilege to resist compelled civil discovery of their sources and materials. *See Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 595 (1st Cir. 1980) ("courts faced with enforcing requests for the discovery of materials used in the preparation of journalistic re-ports should be aware of the possibility that the un-limited or unthinking allowance of such requests will impinge upon First Amendment rights."); *see also von Bulow by Aursperg v. von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987); *United States v. Cuthbertson*, 630 F.2d 139, 146 (3d Cir. 1980); *LaRouche v. Nat'l Broad. Co.*, 780 F.2d 1134, 1139 (4th Cir. 1986); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725 (5th Cir.), opinion supplemented on denial of reh'g, 628 F.2d 932 (5th Cir. 1980); *Cervantes v. Time, Inc.*, 464 F.2d 986, 993 (8th Cir. 1972); *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 437 (10th Cir. 1977); *Price v. Time, Inc.*, 416 F.3d 1327, 1343 (11th Cir.), as modified on denial of reh'g, 425 F.3d 1292 (11th Cir. 2005); *Zerilli v. Smith*, 656 F.2d 705, 710–11 (D.C. Cir. 1981).

Like the speech creation cases, these opinions recognize that the First Amendment extends beyond the actual act of speaking into the resources necessary to speak. The limited journalists' privilege that proceeds from *Branzburg* is premised not on a special status accorded journalists, but on the First Amendment's protections for those preparing to speak.

John Doe's alleged actions fit comfortably within the ambit of the First Amendment protections articulated in these speech-creation and investigative materials cases. He hired a private investigator as part of an effort to expose public corruption.

To be sure, the First Amendment is not a hall pass to break the law in the name of investigation, but there is nothing illegal about hiring a private investigator. To the contrary, "[g]athering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting 'the free discussion of governmental affairs.'" *Glik*, 655 F.3d at 82 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). Investigating public corruption is a laudable part of "our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 755 (2011) (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976)).

At bottom, the Real Parties in Interest want to impose tort liability on John Doe for speech-creation and investigation. Such liability would necessarily burden his First Amendment rights. Of course, that burden may ultimately be justified by countervailing interests, but the Nevada Supreme Court was flatly

incorrect when it held, at the Complaint stage, that "the conduct at issue was non-expressive in nature and not subject to First Amendment protection." *Doe*, 566 P.3d 570. This summary holding threatens violence to the rights of citizen journalists in Nevada, at least—as explained in part I.C, infra, if they are sued in state court. This Court should not permit this plainly unconstitutional holding to chill the necessary work of citizen newsgatherers, particularly in a state with the third-lowest number of local news outlets.

B. The Decision Below Passes on an Issue of Exceptional Constitutional Importance to Investigative Journalism and Conflicts with Federal Decisions

Citizens increasingly rely on information gathered furtively to expose political corruption and otherwise criticize powerful public figures. The Nevada Supeme Court decision undermines this important right of free speech and chills some of the most cherished forms of constitutional speech in America.

1. The Nevada Supreme Court's narrow view of expressive newsgathering practices conflicts with the Ninth Circuit's view—and most federal circuits. The Ninth Circuit has "easily" rejected the claim that precursor conduct to publication is not protected by the First Amendment. *See Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1203 (9th Cir. 2018). "It defies common sense to disaggregate the creation of [speech] from the [speech or publication] itself." In *Wasden*, it was the act of secretly recording (audio or visual) "conduct of an agricultural production facility's operations." *Id.* (quoting Idaho Code § 18–7042(1)(d)). The Ninth Circuit held "[t]he act of recording is itself an inherently expressive activity," because "the recording

process [or conduct] … is 'inextricably intertwined' with the resulting recording." *Id.*

The en banc Ninth Circuit later agreed "that the act of recording is 'inherently expressive' is consistent with the rule that First Amendment protection extends" to conduct meant to be "communitive." *Project Veritas v. Schmidt*, 125 F.4th 929, 945 (9th Cir. 2025), cert. filed, No. 24-1061 (U.S.); *id.* (Because Oregon's "statute will directly regulate Project Veritas's act of creating speech that falls within the core of the First Amendment, it triggers First Amendment scrutiny." (emphasis added).).

Indeed, it is settled among federal circuits that the First Amendment protects the act of speech creation for publication through journalistic tools such as recordings and photography. The First, Third, Fourth, Fifth, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits have recognized that communicative acts of recording qualify as speech and are entitled to First Amendment protection. *See, e.g.*, *Alvarez*, 679 F.3d at 595–97 ("Audio recording is entitled to First Amendment protection."); *Fields v. City of Philadelphia*, 862 F.3d 353, 358 (3d Cir. 2017) (concluding that the First Amendment protects "the act of creating" photos, videos, and recordings); *N.C. Farm Bureau Fed'n, Inc.*, 60 F.4th at 836 (concluding that visual "recording in the employer's nonpublic areas as part of newsgathering constitutes protected speech"); *W. Watersheds Projec*, 869 F.3d at 1195–96 ("If the creation of speech did not warrant protection under the First Amendment, the government could bypass the Constitution by 'simply proceeding upstream and damming the source' of speech." (alterations accepted) (quoting *Buehrle v. City of Key W.*, 813 F.3d 973, 977 (11th Cir. 2015)));

*Turner,*848 F.3d at 688–90 (concluding that "the First Amendment protects the act of making film"); *Glik*, 655 F.3d at 83 (concluding that "the First Amendment protects the filming of government officials in public spaces"); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (concluding that the First Amendment protects the right to visually "record matters of public interest"); *Ness v. City of Bloomington*, 11 F.4th 914, 923 (8th Cir. 2021) (concluding that the "acts of taking photographs and recording videos are entitled to First Amendment protection"); *Price v. Garland*, 45 F.4th 1059, 1071 (D.C. Cir. 2022) (noting that "prohibiting the recording of a public official performing a public duty on public property is unreasonable").

Yet, the Nevada Supreme Court refuses to recognize the First Amendment bona fides of these accepted newsgathering practices. As result, where a reporter or citizen newsgatherer is sued in Nevada will dictate the extent of their constitutional rights. Newsgathering meant to be communicative—like John Doe's conduct here—is protected by the First Amendment in U.S. District Court for the District of Nevada under Ninth Circuit precedent; but the same newsgathering activity enjoys no First Amendment protection if the newsperson is sued in Nevada state court. This federal–state conflict in recognizing a basic constitutional freedom is untenable, and, as explained below, will jeopardize "our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open" in Nevada. *See Ariz. Free Enter. Club's Freedom Club PAC*, 564 U.S. at 755 (internal quotation marks omitted).

2. Anonymous political speech has been a cherished part of the American tradition since the time of the founding. No less than the Federalist Papers were published pseudonymously by "Publius." Other examples abound, including James Madison and Alexander Hamilton anonymously defending President Washington's neutrality declaration in the British and French war. *See* Hamilton, Pacificus No. 1, June 29, 1793, 15 Papers of Alexander Hamilton 33-43 (H. Syrett ed. 1969); Madison, Helvidius No. 1, Aug. 24, 1793, 15 Papers of James Madison 66-73 (T. Mason et al. eds. 1985). For much the same reason that statesmen have long used anonymity to engage in core political speech, citizens today, including John Doe, seek to remain anonymous at times when criticizing those in power.

As this Court has recognized, anonymity is sometimes required for a free people to criticize the government. See *Talley*, at 64 ("[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all."). John Doe, it is undisputed, engaged in investigative activity of potential corruption and misconduct of public figures only on the condition that his identity remain anonymous. If anything, the existence of this lawsuit affirms the common-sense reason many citizens use anonymity to engage in core political speech: those in power who are being criticized have the ability to chill and punish unwanted political speech, if they know the identity of the speaker.

The First Amendment reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide

open…" *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). And we know that the "inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *First Nat. Bank of Boston* v. *Bellotti*, 435 U.S. 765, 777 (1978). Just so here. John Doe's identity must receive First Amendment protection, and at minimum, be scrutinized as a form of political speech subject to First Amendment protection, even if a party may be able to overcome the First Amendment protection after Courts apply exacting scrutiny.

Citizen journalism and anonymous investigative reporting is just the latest iteration of the longstanding American tradition of free and robust political speech and advocacy. It deserves the most robust protection afforded free speech.

C. The Court's Intervention Is Necessary to Prevent Harm to Political Reporters By Chilling Their Speech and the Use Accepted Journalistic Practices

Absent this Court's intervention, John Doe and anyone who seeks to engage in investigative political speech or journalism will be chilled in Nevada from engaging in speech. The Nevada Supreme Court has refused to consider any First Amendment protections for expressive conduct facilitated by investigation. This out-of-step decision threatens to imperil core political speech activity. This Court should insist on uniformity in First Amendment protections for speech facilitating conduct.

1. Eliminating First Amendment protections for newsgathering techniques that are unquestionably

expressive will broadly chill reporting and publication on matters of public concern. The Nevada Supreme Court's failure to apply First Amendment scrutiny to essential precursors to protected speech threatens to chill political reporting and will undermine the Court's longstanding protection of the free press. This Court has consistently recognized that anonymity is vital to free expression, particularly in politically sensitive contexts. The Court in *McIntyre* affirmed that "an author's decision to re-main anonymous ... is an aspect of the freedom of speech protected by the First Amendment." 514 U.S. 334, 342 (1995). The same principle applies to those who must remain anonymous while gathering politically sensitive information for eventual reporting and publication.

Investigative reporting on political corruption, misconduct, or controversial policies or people often requires confidential methods precisely because powerful political interests oppose such scrutiny. By allowing the unmasking of those who hire investigators for political reporting without applying First Amendment scrutiny, the decision below effectively gives the government and litigants a tool to identify and potentially retaliate against journalists and citizen reporters at the earliest stages of investigation—before any story can be published. This empowers those with resources and influence to bypass the Constitution and expose, and potentially retaliate against, those engaged in core political newsgathering.

The consequences are predictable and severe: reporters investigating politically sensitive matters will be forced to choose between abandoning effective investigative techniques or exposing themselves to retaliation before their reporting reaches the public. The

Court should not countenance a rule that so fundamentally undermines protections meant "to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government," *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982), and to render public debate on matters of public concern well informed, *see, e.g.*, *Kleindienst v. Mandel*, 408 U.S. 753, 762–63 (1972); *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 147 (1967); *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967); *Bridges v. California*, 314 U.S. 252, 277–78 (1941).

2. The harm imposed on John Doe through this unmasking litigation without any First Amendment inquiry is case in point. The Nevada Supreme Court's decision is not just a serious constitutional error; it is consequential for John Doe. Expressive conduct is the trigger for identity protection measures like protective orders in the district court. Regardless of whether John Doe can ultimately prove that the First Amendment bars this lawsuit, he still could argue that his identity should be protected in the interim. By issuing a sweeping ruling that his conduct was "non-expressive," the Nevada Supreme Court has precluded John Doe from invoking even preliminary First Amendment protections.

When a person is sued for their anonymous speech, compelling discovery of their identity ("unmasking" them) burdens their right to speak anonymously. *See, e.g.*, *Signature Mgmt. Team, LLC v. Doe*, 876 F.3d 831, 836 (6th Cir. 2017); *In re Anonymous Online Speakers*, 661 F.3d 1168, 1177 (9th Cir. 2011). Because discovery and protective orders are necessarily prior to liability, deciding whether to protect the

identity of a defendant requires a test that does not subsume the ultimate First Amendment question.

In recent decades, courts around the country have unified around expressive conduct as the trigger for First Amendment scrutiny for unmasking a defendant. Though they differ in the precise test they apply, the lower courts have unanimously held that plaintiffs must satisfy some level of First Amendment scrutiny before they can unmask an anonymous defendant who is being sued for expressive activity. *See, e.g.*, *In re Anonymous Online Speakers*, 661 F.3d at 1177; *Columbia Ins. Co. v. seescandy.com*, 185 F.R.D. 573, 579 (N.D. Cal. 1999); *Thomson v. Doe*, 356 P.3d 727, 734 (Wash. 2015); *Solers, Inc. v. Doe*, 977 A.2d 941, 954 (D.C. 2009); *Pilchesky v. Gatelli*, 12 A.3d 430, 443 (Penn. 2011); *Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432 (Md. 2009). This scrutiny is triggered whenever a defendant is being sued for expression; the defendant does not have to show impermissible invasion of a First Amendment right.

Thus, the Nevada Supreme Court's holding will completely erase John Doe's ability to remain anonymous in the district court during litigation. Even if, at the end of the day, the First Amendment does not protect John Doe from liability, it may still protect his identity during this litigation. But the Nevada Supreme Court's error destroys that possibility.

John Doe will be deprived of other arguments, as well. For example, even though this Court has applied First Amendment scrutiny to overturn a conviction for invasion of privacy based on publication of private information, *Time, Inc. v. Hill*, 385 U.S. 374 (1967), John Doe will not be able to raise that argument. Despite

having U.S. Supreme Court precedent directly on point, he will be precluded from raising it.

Exposing John Doe's identity will also subject him to potential retaliation and reputational harm. The plaintiffs below are both politicians and wield great influence in the Reno area. They are fully capable of retaliating against John Doe for his investigation of them. They have already taken to the press to attack him, and those attacks will only intensify if his identity is revealed to them. At bottom, losing access to individual legal arguments is the least of John Doe's worries when his fundamental right to free speech has been wiped away in a one-paragraph order.

CONCLUSION

The petition for certiorari should be granted and the Nevada Supreme Court summarily reversed.

Respectfully submitted,

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MAY 19, 2025

APPENDIX

TABLE OF APPENDICES

APPENDIX A — ORDER OF THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE, FILED AUGUST 8, 2024

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE

CASE NO.: CV22-02015
DEPT. NO.: 15

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.

ORDER AFFIRMING DISCOVERY COMMISSIONER'S RECOMMENDATION FOR ORDER, DATED JUNE 25, 2024

The Discovery Commissioner is an adjunct to the judiciary empowered by NRCP 16.3(b) to preside over discovery motions. The Commissioner is a discovery

expert who performs an essential role to ensure that all disputes are resolved in a "just, speedy, and inexpensive" manner. NRCP 1.

This Court has discretion to determine how the Commissioner's recommendation will be reviewed. WDCR 24(6). This Court determines, consistent with other authorities, that a deferential standard of review is warranted. Otherwise, this Court becomes a de facto second Discovery Commissioner for every dispute in which a litigant is aggrieved. Therefore, the Discovery Commissioner's recommendation will be reversed or modified only if it is "clearly erroneous" and this Court has a "definite and firm conviction that a mistake was made." *Valley Health Sys. LLC v. District Court*, 127 Nev. 167, 252 P.3d 676 (2011) (citing *United States v. Howell*, 231 F.3d 615 (9th Cir. 2000) (noting that Discovery Commissioners promote the efficient use of judicial resources and district courts should prevent parties from making "an end run around" the commissioner and frustrating the very purposes of having commissioner judges)).

This Court has read the Recommendation for Order and the parties' moving papers. It cannot conclude the Recommendation is clearly erroneous; similarly, this Court does not have a definite and firm conviction that a mistake was made. For these reasons, the Discovery Commissioner's recommendation is affirmed. Mr. McNeely shall comply with the Recommendation no later than September 9, 2024.[1]

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1. This Court acknowledges the irreparability of harm if John Doe's identity is disclosed now but an appellate court later

IT IS SO ORDERED.

Dated: This 2 day of August, 2024.

/s/ David A. Hardy
David A. Hardy
District Judge

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reaches a different conclusion. This Court is therefore inclined to grant a stay of proceedings pursuant to NRAP 8 if Mr. McNeely or John Doe chooses to pursue extraordinary relief through a petition for writ of mandamus or prohibition.

APPENDIX B — RECOMMENDATION FOR ORDER OF THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE, FILED JUNE 25, 2024

IN THE SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND
FOR THE COUNTY OF WASHOE

Case No. CV22-02015
Dept. No. 15

HILLARY SCHIEVE, AN INDIVIDUAL, *et al.*,

Plaintiffs,

vs.

DAVID MCNEELY, AN INDIVIDUAL, *et al.*,

Defendants.

Filed June 25, 2024

RECOMMENDATION FOR ORDER

This case involves an issue over whether am unidentified individual may participate in this litigation as an anonymous Defendant, herein referred to as "John Doe." Previously, the Court granted leave for Plaintiffs Hillary Schieve and Vaughn Hartung to proceed with "early discovery for the limited purpose of identifying the 'Doe' defendant(s)." Plaintiffs served Defendants David McNeely and 5 Alpha Industries, LLC

("5 Alpha")[1] with subpoenas duces tecum directing each Defendant to do the following:

> Produce documents, including but not limited to engagement agreements, contracts, invoices, or payments, sufficient to identify each and every individual or entity that hired David McNeely and/or 5 Alpha Industries, LLC to conduct surveillance upon Hillary Schieve, to track Hillary Schieve's location, or to take any other action with respect to Hillary Schieve.

Defendants objected to the subpoenas, which led to the filing of a motion to compel by Plaintiffs and a countermotion for protective order by Defendants. Defendants also filed a motion to dismiss specified claims for relief and remedies sought by Plaintiffs.

In a *Recommendation for Order* entered on March 15, 2023, the Discovery Commissioner determined that the information sought by Plaintiffs is discoverable under NRCP 26(b)(1). In reaching that conclusion, the Discovery Commissioner specifically found that Defendants had not demonstrated that the information sought by Plaintiffs is protected under NRS 49.325 or NRS 648.200. He also determined that Defendants had not demonstrated good cause for the issuance of an order under NRCP 26(c) allowing them to withhold or delay disclosure of that information. Defendants subsequently objected to that recommendation.

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1. Defendant McNeely is a private investigator and 5 Alpha is his business.

Appendix B

In an order entered on May 4, 2023, the Court denied Defendants' objection to the recommendation and adopted that decision in its entirety. It directed Defendants to produce the documents encompassed by the subpoenas no later than May 12, 2023. The Court also addressed the pending motion to dismiss. It found that Plaintiffs' amended complaint satisfied the notice-pleading standards to state a claim for Invasion of Privacy—Public Disclosure of Private Facts (i.e., second claim for relief). However, it also found that Defendants were entitled to an order dismissing the third, fourth, and eighth claims for relief from the amended complaint. On May 5, 2023, John Doe anonymously filed his answer to the amended complaint. Defendants McNeely and 5 Alpha filed their answer to the amended complaint on May 18, 2023.

On May 10, 2023, Plaintiffs and Defendants McNeely and 5 Alpha filed a stipulation staying compliance with the Court's deadline for producing documents sought through Plaintiffs' subpoenas, based upon Defendants' representation that they intended to seek appellate review of the Court's discovery order. In an order entered on that same date, the Court approved the parties' stipulation. The Court also found that John Doe "has made an appearance and is now a party to this action," and it ruled that John Doe would waive any argument to prevent disclosure of his identity unless he filed a motion in that regard no later than May 24, 2023.[2]

2. The ruling regarding a motion to prevent disclosure of John Doe's identity arose out of an earlier motion to stay and a renewed motion to stay filed by John Doe.

Appendix B

On May 12, 2023, Defendants McNeely and 5 Alpha filed a *Petition for Writ of Prohibition or Mandamus* with the Nevada Supreme Court. On May 19, 2023, John Doe filed *Proposed Amicus Curiae John Doe's Motion for Leave to File NRAP 26.1 Disclosure Under Seal* with the appellate court, which included a proposed amicus brief supporting the petition.[3] On May 24, 2023, John Doe filed *Defendant John Doe's Motion for Protective Order* with this Court, in which he sought an order preventing the disclosure of his true name and identity in this litigation. The motion for protective order was fully briefed and submitted, and it was referred to the Discovery Commissioner in an order entered on July 11, 2023. Subsequently, however, the parties agreed to stay all discovery proceedings in this action until completion of the appellate proceeding, and the Court approved that stipulation on November 15, 2023.

On April 15, 2024, the Nevada Supreme Court entered its *Order Denying Petition for Writ of Mandamus or Prohibition*. Our high court declined to entertain the writ petition because "Nevada does not recognize any privilege between private investigators and their clients," the district court has statutory authority to compel

3. In an order entered on June 1, 2023, the appellate court observed that John Doe had not filed a motion for leave to file an amicus brief pursuant to NRAP 29(c). However, it also observed that "it appears that John Doe is already a real party in interest to this appeal and does not need to appear in the role of amicus curiae." It therefore directed the clerk of the court to add John Doe as a petitioner and to file the proposed amicus brief as a supplement to the petition filed by Defendants McNeely and 5 Alpha.

private investigators to disclose information subject to NRS 648.200(1), and "a single client's identity does not fall within the definition of a trade secret." Although John Doe's amicus brief raised additional issues, our high court declined to consider those arguments, "as the district court has yet to hear and decide Doe's arguments on the merits."

On April 18, 2024, John Doe filed his Renewed Motion for Protective Order, in which he seeks an order preventing the disclosure of his true name and identity in this litigation. *Plaintiffs' Opposition to John Doe's Renewed Motion for Protective Order* was filed by Plaintiffs on May 2, 2024. *Defendant John Doe's Reply in Support of Motion for Protective Order* was filed by John Doe on May 10, 2024, and this motion was submitted for decision on that same date. This motion was referred to the Discovery Commissioner in an order entered on May 14, 2024.

A. Impact of John Doe's Appearance

As an initial matter, John Doe argues that Plaintiffs no longer have any need to discover his identity. He states that "Plaintiffs sought discovery regarding John Doe's identity for the sole purpose of serving him with process." John Doe explains that he has now filed an answer, and that "[h]e is participating in this case, and counsel can accept service on his behalf." He therefore maintains that "the purpose and need for the Disclosure Order has been obviated."

John Doe's argument is not compelling. While he is correct that Plaintiffs previously stated in their motion to compel that "the Subpoena is purposefully limited to obtain only the information required to add a necessary party in this case," his argument overlooks other statements from that motion explaining *why* they need his identity:

> Here, unless the identity of the client is disclosed, Schieve would be effectively prevented from pursuing her claims against this party. Schieve's need for the identity of the client is not an ancillary or merely helpful piece of information. Instead, it is one of if not the fundamental factual issue in this case and without which the claims could not proceed against a key defendant. Even if the Court were to agree that the identity is a trade secret, disclosure should still be compelled to avoid a manifest injustice.

Accordingly, in their opposition to the current motion for protective order, Plaintiffs state that "[t]he 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." They also emphasize that the protective order sought by John Doe would significantly impair their discovery efforts in this case.[4]

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4. In that regard, Plaintiffs state as follows:

> Here, a nonexhaustive list of necessary discovery that would be barred or hampered by a protective order

John Doe's anonymous answer simply denies the material allegations of Plaintiffs' amended complaint, asserts multiple affirmative defenses, and denies that Plaintiffs are entitled to any relief. That filing does not in any way negate Plaintiffs' need to know his identity; indeed, it prevents or significantly impedes Plaintiffs' ability to conduct discovery regarding the basis for his denials and affirmative defenses. For example, Plaintiffs allege that Defendants, including John Doe, are responsible for the publication of private information about Plaintiffs. John Doe denies those allegations, but his anonymity would preclude them from ever being able to confirm that he was responsible, in whole or in part, for that publication. Similarly, John Doe states the following two affirmative defenses:

> (a) "Plaintiffs' claims are barred, all or in part, because the damages sustained by Plaintiffs, if any, were caused by third parties over whom Defendant has no control."

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would include depositions of the McNeely Defendants, a deposition of the John Doe Defendant, discovery into the communications between the McNeely Defendants and the John Doe Defendant, discovery into the publications of private information about Plaintiffs by all Defendants, discovery into all of the information gathered by Defendants, and the provision of proof of damages and harm suffered by Plaintiffs. Further, any evidence provided by John Doe cannot be verified or cross-examined as other witnesses could not verify or contradict.

> (b) "Defendant was without knowledge of the acts giving rise to, and could not have averted, the damages, if any, alleged by Plaintiffs."

Without 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.

Significantly, Plaintiffs seek an award of punitive damages in connection with their first, second, fifth, sixth, and seventh claims for relief. In that regard, information about certain other misconduct involving John Doe would be relevant for purposes of NRCP 26(b)(1).[5] Punitive

5. Under NRCP 26(b)(1), "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claims or defenses and proportional to the needs of the case." Although John Doe maintains that his identity is not relevant to any claims or defenses in this action, his identity is arguably needed to obtain relevant discovery. In that regard, the drafters of the analogous federal rule of civil procedure explicitly recognized that "[a] variety of types of information not directly pertinent to the incident in suit could be relevant to the claims or defenses raised in a given action." Fed. R. Civ. P. 26(b)(1) advisory committee's note to 2000 amendments. This would include, for example, "information that could be used to impeach a likely witness." *Id.*; *see also Diamond Pleasanton Enter., Inc. v. City of Pleasanton*, No. 12-cv-00254-WHO, 2015 WL 74946, at *1 (N.D. Cal. Jan. 5, 2015) ("[a]bsent extraordinary circumstances, witnesses do not testify anonymously under our system of laws"). Although a party's identity is needed to obtain discovery in various contexts, that need is especially clear in connection with a claim for punitive damages, as explained in the text.

damages generally may be imposed when plaintiff proves by clear and convincing evidence that defendant has been guilty of oppression, fraud, or malice, express or implied. NRS 42.005(1) (2023); *see also id.* 42.001 (definitions of key terms relating to punitive damages). In assessing punitive damages, the degree of reprehensibility concerning defendant's conduct is one factor to be considered, and repeated misconduct is relevant to that factor. *Wyeth v. Rowatt*, 126 Nev. 446, 474-75, 244 P.3d 765, 784-85 (2010). If John Doe has engaged in improper conduct that could support an award of punitive damages, the extent to which he has engaged in that conduct with other individuals arguably would be relevant to the claim for punitive damages. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 576-77 (1996) (noting that "evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law," and that "repeated misconduct is more reprehensible than an individual instance of malfeasance"). Even *lawful* out-of-state conduct may be probative "when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003). Without knowing John Doe's identity, Plaintiffs are effectively precluded from conducting discovery regarding reprehensibility.[6]

6. While John Doe might seek to assure Plaintiffs and the Court that he has never engaged in conduct that might be relevant to an analysis of reprehensibility, the Court notes that any such assurance would necessarily be made anonymously, which would effectively preclude Plaintiffs from determining the truth and accuracy of that assurance. Under the circumstances presented

The fact that Plaintiffs can serve John Doe through his counsel of record does not sufficiently address the difficulties they will confront if he remains anonymous. Arguably, his having counsel will allow Plaintiffs to serve their discovery requests on John Doe more easily than if he were proceeding as a self-represented party. But the desire to ease service of discovery papers on John Doe was not the primary impetus for Plaintiffs' motion to compel or the Court's disclosure order. Again, at this point in the process, Plaintiffs seek John Doe's identity primarily so that they can conduct full and fair discovery concerning the claims and defenses in this action.[7] The presence of counsel acting on behalf of John Doe does not improve their ability to obtain discovery from him.

John Doe also asserts that Plaintiffs no longer need his identity because he is "participating" in this action, but that statement is misleading. Since the filing of his anonymous answer on May 5, 2023, John Doe's participation has largely consisted of filing a motion for summary judgment,[8] motions to stay enforcement of the Court's disclosure order, an amicus brief (or supplemental

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here, anonymous declarations—which inherently prevent investigation and cross-examination—are entitled to little or no weight.

7. Plaintiffs also observe that, depending upon the identity of John Doe, they might decide to seek additional relief.

8. Significantly, the motion for summary judgment is supported by a Declaration of John Doe. Of course, without knowing his identity, Plaintiffs cannot verify or cross-examine any of the statements made therein.

petition) urging the supreme court to overturn the Court's disclosure order, motions for protective orders that essentially seek to vacate the disclosure order, and a stipulation to stay discovery. Whatever their merits, these filings have done nothing to address Plaintiffs' concerns about their inability to conduct full and fair discovery concerning the claims and defenses in this case. Although the parties' joint case conference report states that John Doe will make his NRCP 16.1(a)(1) initial disclosures by May 24, 2023, his counsel subsequently informed Plaintiffs' counsel that "John Doe 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." Moreover, while Plaintiffs have been prevented from obtaining discovery from or pertaining to John Doe, he has sought to obtain certain "reports regarding Plaintiff Hillary Schieve" and "recordings of any interviews with Plaintiff Hillary Schieve" from the Sparks Police Department. The record shows that John Doe's participation thus far has nothing to do with addressing the impact that his proceeding anonymously will have on Plaintiffs' ability to conduct full and fair discovery. Rather, he is participating only to the extent he chooses to do so and only to obtain relief that will benefit his position. Therefore, the Court finds that John Doe's filing of an answer, retention of counsel, and participation in this action do not moot the dispute over whether his identity must be disclosed.

B. Request to Proceed Anonymously in Civil Actions

No Nevada statute or rule of civil procedure directly addresses the process that must be followed when a party wishes to proceed anonymously in a civil action, or the circumstances when a party should be permitted to do so. In fact, "parties to a lawsuit must typically openly identify themselves in their pleadings to protect the public's legitimate interest in knowing all of the facts involved, including the identities of the parties." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1463 (D.C. Cir. 1995) (cleaned up); *Doe No. 1 v. Wynn Resorts Ltd.*, No. 2:19-cv-01904-GMN-VCF, 2022 WL 3214651, at *3 (D. Nev. Aug. 9, 2022) ("[f]irmly embedded in the American judicial system is a presumption of openness in judicial proceedings"). The public has a common-law right of access to judicial records, *Howard v. State*, 128 Nev. 736, 741-42, 291 P.3d 137, 141 (2012) (quoting *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978)), and allowing a party to litigate anonymously undermines that public right. *See, e.g.*, *Does I Through XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1067-68 (9th Cir. 2000) ("use of fictitious names runs afoul of the public's common law right of access to judicial proceedings"). "[A] presumption arises against anonymous pleading because there is "a First Amendment interest in public proceedings, and identifying the parties to an action is an important part of making it truly public." *K-Beech, Inc. v. Does 1-29*, 826 F. Supp. 2d 903, 904-05 (W.D.N.C. 2011) (quoting *Luckett v. Beaudet*, 21 F. Supp. 2d 1029, 1029 (D. Minn. 1998)).

Nevertheless, many courts have permitted parties to proceed anonymously when special circumstances

justify secrecy. *Advanced Textile*, 214 F.3d at 1067. "[I]t is within the discretion of the district court to grant the 'rare dispensation' of anonymity." E.g., *Microsoft*, 56 F.3d at 1464; *see also Verogna v. Twitter, Inc.*, No. 20-cv-536-SM, 2020 WL 5077094, at *1 (D.N.H. Aug. 27, 2020) ("in exceptional cases, courts have exercised their inherent authority to permit plaintiffs to proceed anonymously"). The Ninth Circuit has explained that "we allow parties to use pseudonyms in the 'unusual case' when nondisclosure of the party's identity 'is necessary . . . to protect a person from harassment, injury, ridicule or personal embarrassment.'" *Advanced Textile*, 214 F.3d at 1067-68 (quoting *United States v. Doe*, 655 F.2d 920, 922 n.1 (9th Cir. 1981)); cf. *S. Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707, 712-13 (5th Cir. 1979) ("[w]here the issues involved are matters of a sensitive and highly personal nature, such as birth control, abortion, homosexuality or the welfare rights of illegitimate children or abandoned families, the normal practice of disclosing the parties' identities yields to a policy of protecting privacy in a very private matter") (cleaned up). Federal appellate courts have generally considered the following factors in deciding whether to allow a litigant to proceed anonymously:

> whether the justification asserted by the requesting party is merely to avoid the annoyance and criticism that may attend any litigation or is to preserve privacy in a matter of sensitive and highly personal nature; whether identification poses a risk of retaliatory physical or mental harm to the requesting party or even

> more critically, to innocent non-parties; the ages of the persons whose privacy interests are sought to be protected; whether the action is against a governmental or private party; and, relatedly, the risk of unfairness to the opposing party from allowing an action against it to proceed anonymously.

James v. Jacobson, 6 F.3d 233, 238 (4th Cir. 1993); *accord In re Sealed Case*, 971 F.3d 324, 326-27 (D.C. Cir. 2020). However, "[n]o single factor is necessarily determinative; a court 'should carefully review ***all*** the circumstances of a given case and then decide whether the customary practice of disclosing the [movant's] identity should yield' to the [movant's] request for anonymity." *Roe v. Doe*, 319 F. Supp. 3d 422, 426 (D.D.C. 2018) (quoting *Doe v. Teti*, No. 1:15-mc-01380, 2015 WL 6689862, at *2 (D.D.C. Oct. 19, 2015)). Although these factors are typically applied when a plaintiff is seeking leave to proceed anonymously, they have also been applied to a defendant's request to proceed anonymously. *See Roe*, 319 F. Supp. at 426. Still, "[i]t is the exceptional case in which a . . . [party] may proceed under a fictitious name." *E.g.*, *K-Beech*, 826 F. Supp. 2d at 905 (quoting *Doe v. Frank*, 951 F.2d 320, 322 (11th Cir. 1992)); *see also Ariz. Bd. of Regents v. Doe,* No. CV-20-01638-PHX-DWL, 2020 WL 5057628, at *1 (D. Ariz. Aug. 27, 2020) ("litigation under a pseudonym is allowed only in 'special circumstances'"); *Roe*, 319 F. Supp. 3d at 426 ("[p]seudonymous litigation is for the unusual or critical case"). "This creates a 'high bar for proceeding under a pseudonym.'" *Ariz. Bd.*, 2020 WL 5057628, at *1 (quoting *Doe v. Ayers*, 789 F.3d 944, 945 (9th Cir. 2015)).

In that regard, "it is the litigant seeking to proceed under pseudonym that bears the burden to demonstrate a legitimate basis for proceeding in that manner." Roe, 319 F. Supp. 3d at 426 (quoting *Qualls v. Rumsfeld*, 228 F.R.D. 8, 13 (D.D.C. 2005)).

With regard to the first factor, John Doe is not seeking to withhold his identity because its disclosure would reveal highly personal and sensitive information about him. For example, disclosure of his identity would not reveal his gender orientation or sensitive medical information about him. The fact that he hired a private investigator is not the kind of deeply personal and sensitive information that courts have referenced in allowing a party to proceed anonymously. Moreover, courts have held that the privacy interest in a person's identifying information "is minimal and not significant enough to warrant the special dispensation of anonymous filing." *W. Coast Prods., Inc. v. Does 1-5829*, 275 F.R.D. 9, 13 (D.D.C. 2011). John Doe also does not argue that disclosure of his identity will subject him to public harassment, ridicule, or significant personal embarrassment. Indeed, any embarrassment would arise not from mere disclosure of his identity, but from the public knowledge that he is being sued for alleged tortious conduct. This is the same kind of "embarrassment" that any defendant faces in a lawsuit alleging tortious conduct, and courts will not extend anonymity to a defendant on that basis alone.

In part, John Doe argues that he will face harassment by Plaintiffs if his identity is disclosed to them. He states that Plaintiffs are now seeking to "penalize" him for hiring

an investigator to determine the veracity of information he had been provided about them, and that "Plaintiffs' maneuver is of particular note because it embodies the exact type of attempt at retribution that John Doe rightly fears."[9] As Plaintiffs assert in their opposition, John Doe mischaracterizes their position in this case. Plaintiffs are not suing John Doe for hiring a private investigator to explore information he received about them. They are suing him for, among other claims, trespass and invasion of privacy. Specifically, Plaintiffs are alleging that "Defendants intentionally entered on Plaintiffs' vehicles and/or private property to place a GPS tracking device on Plaintiffs' vehicles or caused this to be done" at the request of their client, Defendant John Doe, and that Defendants then made certain private information about them available to the public (i.e., "Defendants published or caused to be published private information about Plaintiffs, including but not limited to their locations, their activities, and the movement of their personal vehicles"). Of course, the Court takes no position at this time regarding the merits of Plaintiffs' allegations and claims. But absent evidence that this lawsuit constitutes an abuse of process or is frivolous, the Court will not consider Plaintiffs' filing of a lawsuit to obtain damages (or other relief) for alleged tortious conduct as an "attempt at retribution" or an effort to improperly "penalize" Defendants such that John Doe must be permitted to proceed anonymously.

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9. To the extent John Doe is concerned about unspecified future harassment by Plaintiffs, no evidence has been presented to support that concern and the Court finds that it is purely speculative.

John Doe also asserts that he will suffer an injury if he is not allowed to proceed anonymously, in that disclosure of his identity will infringe upon his First Amendment rights. He contends that his "anonymous hiring of the Investigator Defendants to research and dig up damaging information about Schieve and Hartung is conduct that is protected by the First Amendment." As explained above, that contention is misplaced because Plaintiffs are not seeking relief in this action based upon John Doe's hiring of a private investigator to research what he believed to be credible allegations regarding alleged improper conduct by Plaintiffs. They seek relief primarily for trespass and invasion of privacy. But John Doe maintains that the First Amendment protects his right to engage in anonymous political activity. He observes that a party engaging in political activity may desire anonymity due to the fear of retaliation, social ostracism, or the desire to preserve his or her privacy. He also notes that anonymity may prevent individuals from prejudging the party's message simply because they do not like its proponent. The Court recognizes that individuals are entitled to engage in anonymous political speech or conduct under appropriate circumstances. But John Doe has not cited the Court to any ruling or analysis finding that a person who allegedly engaged in tortious conduct while exercising his or her right to free speech is entitled to anonymity when he or she is later sued for that tortious conduct.

In *Hard Drive Productions, Inc. v. Does 1-1,495*, 892 F. Supp. 2d 334 (D.D.C. 2012), plaintiff filed a copyright infringement action against unidentified defendants who allegedly illegally copied and distributed its copyrighted work on the internet. After plaintiff sought to obtain

defendants' identifying information from their internet service providers ("ISPs"), the court was asked to address the issue of whether the First Amendment allowed defendants to proceed anonymously. *Id.* at 336-37. The court recognized that the First Amendment protects the right to speak anonymously, and that this protection extends to anonymous speech on the internet. *Id.* at 338. It found that the alleged file-sharing "is, 'on some level,' expressive activity," and that defendants were entitled to "some First Amendment protection of their anonymity." *Id.* (quoting *Call of the Wild Movie, LLC v. Does 1-1,062*, 770 F. Supp. 2d 332, 349-50 (D.D.C. 2011)). But it emphasized that "the First Amendment's protection is not absolute and does not extend to copyright infringement." *Id.* In that regard, "where defendants' expressive activity is alleged to infringe plaintiff's copyright, defendants' First Amendment right to anonymity is 'exceedingly small.'" *Id.* (quoting *Arista Records LLC v. Does* 1-19, 551 F. Supp. 1, 8 (D.D.C. 2008)).

The court then identified the factors that it should consider in determining whether defendants' identities should remain undisclosed:

> [T]he Court must weigh plaintiff's need for defendants' identities against defendants' limited First Amendment right to anonymous file sharing . . . The *Sony* test balances the following five factors: (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.

Id. at 339 (referencing *Sony Music Entm't, Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 565 (S.D.N.Y. 2004)).[10]

10. The *Hard Drive* court rejected an alternative test set forth in *Dendrite Int'l, Inc. v. Doe No. 3*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001), a case in which an unidentified defendant posted allegedly defamatory comments about plaintiff on a Yahoo! bulletin board. In that case, the appellate court found that the trial court must balance defendant's "well-established First Amendment right to speak anonymously" with plaintiff's right "to protect its proprietary interests and reputation through the assertion of recognizable claims based on the actionable conduct of the anonymous, fictitiously-named defendants." *Id.* at 760. In addition to identifying certain procedures that must be followed, the appellate court held that the plaintiff in such a case must make a prima facie showing regarding its defamation claim against doe defendants, through sufficient evidence supporting each element of its claim. If it does so, the trial court must then "balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed." *Id.* at 760-61. However, the Hard Drive court observed that "Dendrite concerned allegedly defamatory comments posted on an Internet bulletin board, not, as here, the less expressive act of file sharing." *Hard Drive*, 892 F. Supp. 2d at 339 (cleaned up); *see also Call of the Wild Movie, LLC v. Does 1-1,062*, 770 F. Supp. 2d 332, 350-51 & n.7 (D.D.C. 2011) ("[t]he First Amendment interests implicated in defamation actions, where expressive communication is the key issue, is considerably greater than in file-sharing cases"). Therefore, in accordance with other courts, the *Hard Drive* court concluded that the *Sony* test was better suited to the file-sharing context and it declined to apply the *Dendrite* test. *Hard Drive*, 892 F. Supp. 2d at 339.

It then found that plaintiff had supported its allegations of copyright infringement by identifying the date and time of each allegedly infringing act and the internet protocol address assigned at the time of each such act, and by providing a declaration explaining how it identified defendants' allegedly infringing acts. It observed that plaintiff's discovery request was appropriately limited to obtaining information needed to identify defendants. The court further observed that plaintiff's subpoenas were the only way it could obtain defendants' identities and that plaintiff could not advance its claims without being able to name and serve process on defendants. Finally, the court observed that defendants had little expectation of privacy in subscriber information already provided to their ISPs, and it emphasized that "defendants' First Amendment right to anonymity is minimal in this setting." *Id.* at 339-40. Because each of the applicable factors supported disclosure of defendants' identities, the Court found that plaintiff's need for those identities to pursue its copyright infringement claims outweighed defendants' First Amendment interests in anonymity. *Id.* at 340.

The First Amendment was also implicated in a defendant's request to proceed anonymously in *Arizona Board of Regents v. Doe.* In that case, defendant filed his answer under a pseudonym and, citing First Amendment concerns, indicated that he intended to continue litigating under a pseudonym. The court explained that defendant faced a high bar for proceeding under a pseudonym and that he would only be permitted to do so if nondisclosure of his identity was necessary to protect him from harassment, injury, ridicule or personal embarrassment,

since anonymity would infringe on the public's common-law right of access to judicial proceedings. *Ariz. Bd. of Regents*, 2020 WL 5057628, at *1. The court acknowledged that defendant had raised first amendment concerns in his answer, but emphasized that those concerns would not necessarily permit a defendant to proceed anonymously:

> Although First Amendment concerns may contribute to a party's need to proceed under a pseudonym, they are only one factor among many, and a party still must demonstrate those concerns outweigh the public's interest and the prejudice to the other party. *See, e.g., Publius v. Boyer-Vine*, 321 F.R.D. 358, 361-366 (E.D. Cal. 2017). Additionally, Doe's status as a defendant may further complicate the analysis. *See, e.g.*, *Signature Mgmt. Team, LLC v. Doe*, 876 F.3d 831, 837 (6th Cir. 2017) ("[A] plaintiff who obtains an ongoing remedy such as a permanent injunction will have a strong interest in unmasking an anonymous defendant."); Joan Steinman, *Public Trial, Pseudonymous Parties: When Should Litigants Be Permitted to Keep Their Identities Confidential?*, 37 Hastings L.J. 1, 85 (1985) ("[T]here is arguably a greater public interest in knowing the identity of defendants than of plaintiffs, because only defendants are accused of wrongdoing, and wrongdoers pose varying degrees of threat to the public."); Colleen Michuda, *Defendant Doe's Quest for Anonymity: Is the Hurdle Insurmountable?*, 29 Loy. U. Chi. L.J. 141, 150 (1997) ("Instances of defendant anonymity

> are rare except in two areas of the law: 1) suits involving both anonymous plaintiffs and defendants, such as divorce or child custody cases; and 2) suits where plaintiffs designate the defendant by a pseudonym because the defendant's true identity was unknown at the time the suit was filed.").

Id. at *2. Therefore, the court ruled that "[i]f Doe wishes to maintain anonymity in this action, he must file 'a well-reasoned motion to proceed anonymously.'" *Id.* (quoting *K-Beech, Inc.*, 826 F.2d at 905).

These cases demonstrate that First Amendment concerns will not automatically bar Plaintiffs from obtaining information identifying John Doe. Individuals who wish to exercise their First Amendment rights do not have "a constitutional right to do so whenever and however and wherever they please." *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 568 (1972) (observing that "[t]hat concept of constitutional law was vigorously and forthrightly rejected [and] . . . [w]e reject it again"); *cf. Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971) ("[t]he First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering," and it "is not a license to trespass . . . or to intrude by electronic means into the precincts of another's home or office"). But assuming that John Doe's conduct in hiring a private investigator to explore possible misconduct by Plaintiffs is expressive activity entitling him to some First Amendment protection of his anonymity, application of the test set forth in *Sony Music Entertainment, Inc. v. Does 1-40* will determine

whether First Amendment concerns allow him to proceed anonymously in this action.

Plaintiffs have made the requisite "concrete showing of a prima facie claim" for trespass. "To maintain a trespass action, the plaintiff must demonstrate that the defendant invaded a property right." *Iliescu, Tr. of John Iliescu, Jr. & Sonnia Iliescu 1992 Family Tr. v. Reg'l Transp. Comm'n*, 138 Nev., Adv. Op. 72, at 9, 522 P.3d 453, 460 (2022). Attaching a GPS tracking device to another individual's automobile without authorization arguably may be viewed as a trespass. *Cf. United States v. Jones*, 565 U.S. 400, 410 (2012) (in surreptitiously attaching a GPS tracking device to vehicle owned by defendant, government "trespassorily inserted the information-gathering device"). In a declaration attached to an earlier motion for summary judgment, John Doe concedes that he retained Defendants McNeely and 5 Alpha to investigate information about possible misconduct by Plaintiffs. In their answer to the amended complaint, Defendants McNeely and 5 Alpha admit "that McNeely, acting as a private investigator pursuant to a client engagement, placed a GPS tracking device on what he understood to be the vehicle of Plaintiff Hillary Schieve and the vehicle of Plaintiff Vaughn Hartung." Thus, Plaintiffs have made a prima facie showing to support their trespass claim.

For the same reasons, Plaintiffs have made the requisite "concrete showing of a prima facie claim" for invasion of privacy based upon intrusion upon seclusion. To bring a claim for invasion of privacy based on intrusion upon seclusion, plaintiff must show: "1) an intentional

intrusion (physical or otherwise); 2) on the solitude or seclusion of another; 3) that would be highly offensive to a reasonable person." *PETA v. Bobby Berosini, Ltd.*, 111 Nev. 615, 630, 895 P.2d 1269, 1279 (1995), *overruled on other grounds by City of Las Vegas Downtown Redev. Agency v. Hecht*, 113 Nev. 644, 650, 940 P.2d 134, 138 (1997). Attaching a GPS tracking device to another individual's automobile without authorization arguably implicates the tort of invasion of privacy. *See Ringelberg v. Vanguard Integrity Prof 'ls-Nev., Inc.*, No. 2:17-cv-01 788-JAD-PAL, 2018 WL 6308737, at *9 (D. Nev. Dec. 3, 2018) (plaintiff could proceed with claim for invasion of privacy based on intrusion upon seclusion, because he presented evidence that private investigator installed tracking device on plaintiff's car at the direction of defendant's attorney). Based upon the evidence described in the preceding paragraph, Plaintiffs have made a prima facie showing in support of their invasion-of-privacy claim.

John Doe states that Plaintiffs have not presented evidence of wrongdoing in support of their claims. As the cases cited in the preceding paragraphs demonstrate, attaching a tracking device to their vehicles can constitute trespass and invasion of privacy, and Defendants McNeely and 5 Alpha acknowledge that they attached tracking devices to Plaintiffs' vehicles. Moreover, John Doe admits that he hired Defendants McNeely and 5 Alpha to conduct the investigation wherein they attached the tracking devices to Plaintiffs' vehicles.[11]

11. John Doe states that his hiring of Defendant McNeely to investigate Plaintiffs was not tortious. But the attachment of tracking devices to Plaintiffs' vehicles arguably was tortious,

Admission of the truth of an allegation in a pleading is a judicial admission conclusive on the pleader, and that admission renders unnecessary the production of evidence by the opposing party as to the fact admitted. *See, e.g.*, *Gibbs ex rel. Estate of Gibbs v. CIGNA Corp.*, 440 F.3d 571, 5758 (2d Cir. 2006) ("[f]acts admitted in an answer, as in any pleading, are judicial admissions that bind the defendant throughout this litigation"). In any event, a fundamental purpose of discovery is to allow parties to "obtain evidence necessary to evaluate and resolve their dispute." *E.g.*, *Stephen v. Montejo*, No. 2:18-cv-1796 KJM DB P, 2022 WL 286906, at *1 (E.D. Cal. Jan. 31, 2022) (quoting *United States v. Chapman Univ.*, 245 F.R.D. 646, 648 (C.D. Cal. 2007) (quotation and citation omitted)). Maintaining John Doe's anonymity substantially impedes, and arguably precludes, Plaintiffs from potentially obtaining direct evidence of John Doe's alleged wrongdoing (e.g., testimony obtained during oral deposition of John Doe, hypothetical communications between John Doe and third parties discussing his approval or ratification of the use of tracking devices on Plaintiffs' vehicles, etc.).

The remaining elements of the *Sony* test militate against allowing John Doe to proceed anonymously.

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and Defendants McNeely and 5 Alpha engaged in that conduct during the course of the investigation that John Doe hired them to conduct. The jury might ultimately determine that John Doe is not liable to Plaintiffs for any alleged conduct; but it also could ultimately determine that John Doe is vicariously liable for the tortious conduct of his Co-Defendants, or possibly even that he is directly liable to Plaintiffs under one or more claims for relief.

Like the subpoenas in *Hard Drive*, Plaintiffs' subpoenas to Defendants McNeely and 5 Alpha are appropriately limited to obtaining information needed to identify John Doe. They only seek documents "sufficient to identify" anyone who hired Defendants McNeely or 5 Alpha to surveil, track, or take other action regarding Plaintiff Schieve. Those subpoenas appear to be the only way for Plaintiffs to obtain John Doe's identity because only Defendant McNeely and 5 Alpha (and John Doe) know the identity of the person who hired them. Without John Doe's identifying information, Plaintiffs cannot effectively litigate their claims against him or obtain discovery regarding certain affirmative defenses he has asserted. The lack of identifying information also would effectively preclude them from obtaining information and documents that might contradict or undermine John Doe's oral or written testimony, or that might identify other potential witnesses. It would substantially impair their ability to depose John Doe and the other Defendants, to obtain communications among them, to determine the full extent of information gathered by Defendants, to investigate their alleged publication of Plaintiffs' private information, and to conduct discovery relevant to their claim for punitive damages. And while John Doe might have had a legitimate expectation of privacy regarding his identity based upon representations made to him by Defendants McNeely and 5 Alpha, any privacy interest in his identifying information is minimal in this context (i.e., as a defendant being sued for tortious conduct). In any event, that one factor is substantially outweighed by the others. On the record presented here, the Court is not persuaded that the asserted "injury" to John Doe's First

Amendments rights warrants an order permitting him to proceed anonymously in this action.[12]

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12. John Doe argues that in resolving his request for anonymity, this Court should apply the test articulated in *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010). The Court does not find the analytical framework described in that case to be appropriate here. *Perry* was an action to have a ballot initiative approved by voters declared unconstitutional. That case did not involve a request by a party for leave to proceed anonymously; rather, plaintiffs sought all communications between proponents of the initiative and any third parties. Further, *Perry* did not involve allegations that unidentified defendants engaged in tortious conduct against plaintiffs. John Doe also argues that an alternative test articulated in *Highfields Capital Management, LP v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2005), should be applied. In that case, plaintiff served a subpoena on non-party Yahoo! to learn the identity of an unknown poster using plaintiff's name on Yahoo's internet message board in connection with plaintiff's claims for commercial disparagement and trademark infringement. The district court granted a motion to quash that subpoena because it found that plaintiff could not show that the anonymous defendant engaged in wrongful conduct causing harm to plaintiff. As explained by the court:

> [P]laintiff has failed to demonstrate that a reasonable person perusing the message board at issue would understand the statements as having been made by plaintiff itself, which is plaintiff's theory in support of its defamation and commercial disparagement claims, or as statements made in connection with commercial services being offered by defendant, which is plaintiff's theory in support of its claims sounding in trademark.

Id. at 971 (footnote omitted). Of course, no such finding has been made in the case at bar, and this discovery motion is not the appropriate procedural setting to make any such assessment regarding the merits of Plaintiffs' claims.

Appendix B

John Doe places heavy reliance on *Tichinin v. City of Morgan Hill*, 99 Cal. Rptr. 3d 661 (Ct. App. 2009). In that case, as described by John Doe, plaintiff hired a private investigator on behalf of a client to look into a rumor that the city manager and city attorney were having an affair. After the city manager discovered he was under surveillance, the city council created a subcommittee, and a private investigator hired by the subcommittee determined that plaintiff had been involved in the surveillance. The city council adopted a resolution condemning plaintiff, who then filed a lawsuit against the city for civil rights violations. The city responded with a motion to dismiss plaintiff's lawsuit, which was granted. John Doe observes that the California Court of Appeal subsequently held that plaintiff's hiring of a private investigator and investigating the rumored inappropriate relationship between two city officials was entitled to constitutional protection under the right to petition, because restricting or penalizing pre-litigation investigation could substantially interfere with and thus burden the effective exercise of one's right to petition. Further, the appellate court concluded that plaintiff's hiring of a private investigator could also be considered protected under the right of free speech.

John Doe emphasizes the parallels between the facts in *Tichinin* and those in the case at bar; however, this case differs from *Tichinin* in at least one key aspect. In *Tichinin*, neither plaintiff nor his private investigator were ever accused of engaging in unlawful conduct. The city council's condemnation merely stated that plaintiff's surveillance activities were "unwarranted and

unjustified," and asked that he immediately resign from the city's Urban Limit Line Subcommittee.[13] Further, the appellate court concluded that plaintiff was engaged in conduct protected by the First Amendment rights to petition and of free speech. Although John Doe has asserted an affirmative defense that "[t]he conduct described in the Amended Complaint is protected by the constitutions of the United States and the State of Nevada," that issue has yet to be determined in this action. As explained previously, while John Doe maintains that he merely hired a private investigator to investigate possible misconduct by elected officials, Plaintiffs allege that Defendants engaged in tortious conduct in connection with that investigation. The *Tichinin* court did *not* hold that tortious conduct is protected by the First Amendment. Finally, the *Tichinin* decision 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.

With regard to other factors relevant to his request, the Court finds that John Doe has not presented evidence sufficient to show any plausible risk of retaliatory physical or mental harm to him or to innocent third parties if his request is denied. Courts generally find a risk of retaliatory harm when the moving party provides evidence that psychological damage or violent threats

13. Because plaintiff had previously denied any involvement in the surveillance—a denial that he later admitted was untrue—the council also stated that it "deplores the false statements that he made to City Council members to avoid disclosure of the surveillance."

are anticipated if his or her identity is disclosed. *See Roe*, 319 F. Supp. 3d at 426 (citing cases). In that regard, mere embarrassment and harassment would be insufficient to demonstrate retaliatory harm, and no evidence has been presented to show that any feared reputational harm to John Doe is more than speculative. Even with enhanced media attention, this case does not present the kind of inflammatory facts that would lead to a plausible concern about violence being directed at John Doe or any innocent third parties. Moreover, John Doe does not cite any potential economic harm he would experience if his request is denied. In any event, "a threat of economic harm alone does not generally permit a court to let litigants proceeds [sic] under pseudonym." *Qualls*, 228 F.R.D. at 12. Without anything to suggest that this case is likely to attract the kind of attention that could generate retaliatory physical or mental harm to John Doe, this factor weighs against allowing him to proceed pseudonymously.

In addition, no evidence suggests that the Court should be concerned about the disclosure of John Doe's identifying information due to his age. John Doe presumably was more than eighteen years old when the events described in the complaint occurred, and courts have recognized that this factor weighs against proceeding pseudonymously when the movant is an adult. *See Roe*, 319 F. Supp. 3d at 428 (citing cases). This factor therefore provides further support for Plaintiffs' position.

John Doe asserts that he hired Defendant McNeely and 5 Alpha to investigate the veracity of information he had received concerning misconduct by two elected officials. In litigation arising out of a challenge to

government or government activity, courts arguably are more likely to allow an individual litigant to proceed anonymously. *Id.* at 429. But nothing in the record states or suggests that John Doe is involved in a challenge to government or government activity. Although John Doe asserts that he hired Defendants McNeely and 5 Alpha "solely to investigate allegations of misconduct by Plaintiffs—an issue that would be of public interest and importance if true," he has provided no evidence to support that assertion. John Doe has not identified the person or persons who provided him with the "allegations of misconduct," nor has he described the nature of those allegations. Absent such evidence, the Court cannot accept John Doe's representation that his actions served the public interest. In addition, nothing in the record suggests that he was acting as a whistleblower regarding improper government conduct. Perhaps most important, nothing in the record states or suggests that the investigation actually revealed any improper conduct by either Plaintiff. Significantly, John Doe is not being sued by the City of Reno, the County of Washoe, or even by the Mayor of Reno or a Washoe County Commissioner in their official capacities. Their primary claims for relief are not rooted in their status as elected officials—they are suing for trespasses involving their private property and invasions of their privacy. "[A]t least some persuasive authority in other jurisdictions supports the view that there is '*more* reason *not* to grant the . . . [party's] request for anonymity' in a suit between private parties rather than against the government." *Id.* (quoting *Doe v. Frank*, 951 F.2d 320, 324 (11th Cir. 1992)). The Court therefore finds that these facts weigh in favor of denying John Doe's request.

The risk of unfairness to Plaintiffs has already been addressed, and the Court finds that this is a significant factor. The Court also observes that John Doe's request for anonymity would infringe on the public's common-law right of access to judicial proceedings and its First Amendment interest in public proceedings. Again, instances of defendant anonymity are rare and John Doe has not cleared the high bar for proceeding under a pseudonym on the record presented. Because all or most of the applicable factors support disclosure of John Doe's identity, Plaintiffs' need for his identifying information to pursue their claims for trespass and invasion of privacy outweigh John Doe's desire or need for anonymity in this case.

In his reply brief, John Doe states that "John Doe Did Nothing Unlawful," and he makes the following argument:

> Plaintiffs have never established that John Doe is liable in tort or guilty of a crime, although the Opposition incorrectly presumes so. Indeed, the whole Opposition is premised on this errant presumption.
>
> All John Doe did was to hire a private investigation. This is undisputably 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. In other words, tracking a public official's vehicle on public roads was not illegal in Nevada at any

> relevant time. *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. . . .

Of course, this litigation is the means through which Plaintiffs are attempting to establish that John Doe is liable in tort; they are not required to prove his liability in order to obtain discovery. As for the statement that John Doe merely hired a private investigator, the purpose of discovery and the trial is to determine what John Doe (and the other Defendants) did or did not do. Plaintiffs are not required to accept John Doe's statement about what he did at face value. John Doe also states that Defendants, including John Doe, did nothing "illegal." But whether the alleged misconduct could subject them to criminal liability is immaterial—this is a civil case. At present, the Court has not found that Plaintiffs are precluded from proceeding against John Doe for trespass, invasion of privacy, and other claims that were not removed from this case in connection with the earlier motion to dismiss.[14]

14. In fact, in its orders of May 4, 2023, and July 13, 2023, the Court expressly found that in connection with their second claim for relief, Plaintiffs satisfied the notice-pleading standards to state a claim for Invasion of Privacy—Public Disclosure of Private Facts.

Moreover, a discovery motion is not the appropriate procedural mechanism to address the merits of the parties' claims and defenses.[15]

John Doe concludes that "the First Amendment protects John Doe's right to anonymously investigate elected officials," but that statement is not necessarily true to the extent that the investigative methods used constitute tortious conduct.[16] He adds that "permitting

15. Many courts agree with this proposition. *See, e.g., Am. Air Filter Co. v. Universal Air Prods., LLC*, No. 3:14-CV-665-TBR-LLK, 2015 WL 3862529, at *1 (W.D. Ky. June 22, 2015) ("[t]he Court believes that trial or a dispositive motion, not a discovery motion, provides the proper mechanism for determining the implications of the Settlement Agreement"); *Yarus v. Walgreen Co., Civil Action No. 14-1656*, 2015 WL 1021282, at *4 n.1 (E.D. Pa. Mar. 6, 2015) ("[t]he Court finds it inappropriate to debate the merits of Plaintiff's pled theory of liability in an order on a discovery motion"); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Coinstar, Inc.*, No. C13-1014-JCC, 2014 WL 3396124, at *2 (W.D. Wash. July 10, 2014) ("the Court finds that it would be inappropriate to rule on the merits of the underlying counterclaim when considering discovery motions"); Brown v. Bridges, No. 3:12-cv-4947-P, 2013 WL 11842015, at *1 (N.D. Tex. Aug. 26, 2013) ("[t]his discovery motion is not the proper context for . . . merits-directed arguments"); *Clark Motor Co. v. Mfrs. & Traders Tr. Co.*, No. 4:07-CV-856, 2008 WL 2498252, at *1 (M.D. Pa. June 18, 2008) (objection to discovery requests "may not be used as a vehicle for deciding the merits of a case").

16. Again, John Doe is not being sued for exercising his right to "investigate elected officials." He is being sued for alleged tortious conduct—primarily, trespass and invasion of privacy. Assuming, arguendo, that John Doe has a First Amendment right to anonymously hire a private investigator to *lawfully* investigate suspected misconduct by elected officials, he has not shown that he

discovery into John Doe's identity would chill his First Amendment activities," and he observes that he was attempting to determine whether information about rumors concerning misconduct by Plaintiffs was accurate, a matter he believed was of public concern. But the public does not necessarily have an interest in protecting a tortfeasor from the consequences of his or her tortious conduct committed while he or she was engaged in First Amendment activities.[17]

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has a First Amendment right to hire that individual to investigate suspected misconduct by elected officials through *unlawful* methods. The cases cited by John Doe finding that the government cannot, by statute or otherwise, compel the disclosure of an individual's identity while that individual is engaging in *lawful* (i.e., not tortious) constitutionally protected speech or conduct, or otherwise deprive an individual of the ability to engage in *lawful* anonymous political speech, are simply inapposite.

17. The Court will take this opportunity to re-emphasize that it has not in any way determined that John Doe engaged in any tortious conduct alleged in Plaintiffs' amended complaint, or that he is otherwise liable for any such conduct. But Plaintiffs are presumptively entitled to obtain discovery regarding any nonprivileged matter that is relevant to the claims and defenses in the case, and the discovery of which is proportional to the needs of the case. NRCP 26(b)(1). Because Plaintiffs *claim* that John Doe engaged in, or is otherwise responsible for, certain tortious conduct alleged in the amended complaint, they are presumptively entitled to obtain relevant and proportional discovery regarding that claim, even if John Doe denies that claim. In addition, Plaintiffs note that John Doe's identity is relevant because they might decide to seek a restraining order depending upon his identity and motivations. The Court previously recognized the relevance of this kind of concern through its adoption of the previous *Recommendation for Order*, which contained the following observations:

The fact that the private investigator guaranteed confidentiality—another point raised by John Doe—is irrelevant, because no such guarantee could legitimately shield John Doe's identity to the extent that he directed the investigator to engage in tortious conduct or is otherwise liable for that conduct. Therefore, the Court finds that John Doe's arguments that he is entitled to proceed anonymously in this action based upon the First Amendment are without merit.

Plaintiffs also highlight the fact that they are both public officials, another factor that militates in favor of disclosure. As alleged in the complaint, Defendants—presumably at the request of their client— "captured comprehensive information about the most private details of Plaintiffs' lives such as the times and locations of their visits to family members, religious institutions, personal and professional associations, and/or medical providers." Plaintiffs also allege that this information was obtained and publicized despite a "rise in violent attacks on elected officials across the country." They allege that their knowledge of these actions has disrupted their lives and caused them significant fear and distress. The public has a legitimate and significant interest in knowing about actions that place our elected officials at greater risk for harm and potentially impact their ability to perform the functions for which they were elected, and the public has a like interest in knowing who is responsible for those actions. The identity of Defendants' client would take on heightened importance if the client is someone who has a significant involvement in politics or who might seek public office in the future.

C. Protective Orders Generally

Although John Doe's request was presented as a motion for protective order, it essentially is a motion for leave to proceed anonymously in this action and the Court has analyzed it as such. For reasons explained above, the Court finds that John Doe has not demonstrated that he is entitled to proceed anonymously in this case under standards applicable to motions of that sort. But even if the Court were to analyze this request under standards applicable to a motion for protective order, the motion must be denied.

NRCP 26(c)(1) provides, in pertinent part, that "[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." This rule also provides examples of the kinds of orders that may be entered, which include orders forbidding the discovery, specifying the terms for the discovery, prescribing a discovery method other than the one selected by the party seeking discovery, and limiting discovery to certain matters. This rule confers "broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required." *Venetian Casino Resort, LLC v. Dist. Court*, 136 Nev. 221, 226-27, 467 P.3d 1, 6 (Ct. App. 2020) (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984)). But the party or person seeking a protective order has the burden of establishing good cause for the requested order. *See Okada v. Dist. Court*, 131 Nev. 834, 841, 359 P.3d 1106, 1111 (2015) (citing *Cadent Ltd. v. 3M Unitek Corp.*, 232 F.R.D. 625, 629 (C.D. Cal. 2005)) ("FRCP 26(c), which is the analog to NRCP 26(c), requires

the party seeking the protective order to establish 'good cause'"). The existence of good cause is a factual matter to be determined from the nature and character of the information sought weighed in the balance of the factual issues involved in each action. *E.g.*, *Chi. Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1314-15 (11th Cir. 2001); *Munoz v. PHH Corp.*, No. 1: 08-cv-0759-DAD-BAM, 2016 WL 10077139, at *2 (E.D. Cal. Feb. 11, 2016). In that regard, courts insist upon a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements, in order to establish good cause. *E.g.*, *Hawley v. Hall*, 131 F.R.D. 578, 583 (D. Nev. 1990).

While courts should consider any relevant factors in determining whether a protective order is appropriate under NRCP 26(c)(1), the Nevada Court of Appeals has approved a three-part framework for determining whether good cause exists to protect against the disclosure of information:

> First, the district court must determine if particularized harm would occur due to public disclosure of the information.
>
> Second, if the district court concludes that particularized harm would result, then it must balance the public and private interests to decide whether a protective order is necessary. . . .
>
> Third, even if the factors balance in favor of protecting the discovery material, a court must still consider whether redacting portions

> of the discovery material will nevertheless allow disclosure.

Venetian Casino, 136 Nev. at 227-28, 467 P.3d at 6-7 (cleaned up). This test was articulated by the Ninth Circuit Court of Appeals in *In re Roman Catholic Archbishop of Portland in Or.*, 661 F.3d 417 (9th Cir. 2011). In reliance on that same case, the Nevada appellate court also directed lower courts and practitioners to consider a "nonmandatory and nonexhaustive" list of factors in balancing private and public interests:

> (1) whether disclosure will violate any privacy interests; (2) whether the information is being sought for a legitimate purpose or for an improper purpose; (3) whether disclosure of the information will cause a party embarrassment; (4) whether confidentiality is being sought over information important to public health and safety; (5) whether the sharing of information among litigants will promote fairness and efficiency; (6) whether a party benefiting from the order of confidentiality is a public entity or official; and (7) whether the case involves issues important to the public.

Venetian Casino, 136 Nev. at 227, 467 P.3d at 7 (quoting *Glenmede Tr. Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995)).

Preliminarily, Plaintiffs have not necessarily indicated that they seek the documents described in their subpoenas so that they can release those documents to the

public. Rather, they seek those documents so that they can ascertain the identity of John Doe and effectively litigate their claims in this case. In any event, John Doe has not demonstrated particularized harm that would occur to him due to public disclosure of his identity. As explained previously, John Doe has not presented evidence sufficient to support a finding of any plausible risk of retaliatory physical or mental harm to him or to others, or of any potential economic harm he would experience, if his request is denied. Any feared reputational harm or fear of future harassment against him by Plaintiffs is speculative, and any desire to avoid the embarrassment of being identified as a defendant in this action is not a sufficient harm for purposes of the *Venetian* test. Further, his claim of harm associated with any infringement of his First Amendment rights is insufficient because he has not demonstrated that this lawsuit is an improper infringement upon those rights.

Assuming, arguendo, that John Doe could make a showing of particularized harm, the Court must balance the public and private interests to decide whether a protective order is necessary. For reasons explained previously, the Court is not persuaded that disclosure of John Doe's identity will violate any legitimate interests he might have in keeping his identity private. The information sought by Plaintiffs is for a legitimate purpose—so that they can fully and effectively litigate their claims in this action for which supporting evidence has been presented. While the disclosure of John Doe's identity might cause him embarrassment, it is no more than the embarrassment that any alleged tortfeasor experiences in a civil action. Disclosure of his identity will not result in the disclosure

of deeply private or sensitive information about him. The confidentiality of John Doe's identity is not important to public health and safety. For reasons already explained, the Court finds that disclosure of John Doe's identity will promote fairness and efficiency in this litigation. The party benefiting from confidentiality here is John Doe, who does not purport to be a public official. Finally, this case arguably involves issues important to the public, since it involves alleged tortious actions directed toward their elected officials. Moreover, maintaining that confidentiality arguably infringes on the public's common-law right of, and First Amendment interest in, access to judicial proceedings. After considering the public and private interests, the Court finds that a protective order is not warranted even if John Doe could make a showing of particularized harm.[18]

D. Conclusion

Although John Doe has filed an answer to the amended complaint, his filing of an answer, retention of counsel, and participation in this action do not moot the dispute over whether his identity must be disclosed, because his continuing anonymity precludes Plaintiffs from conducting full and fair discovery regarding the claims and defenses asserted in this action. Because of the public's common-law right of access to judicial records and First Amendment interest in public proceedings, requests to proceed anonymously in civil actions are granted only in unusual

18. In light of the Court's findings regarding the first and second prongs of the *Venetian* analysis, it need not consider whether redacting portions of the discovery material will nevertheless allow disclosure.

cases, when the moving party can show that nondisclosure of the party's identity is necessary to protect against harassment, injury, ridicule, or personal embarrassment. In this case, John Doe has not shown that disclosure of his identity will reveal highly personal and sensitive information about him, or that disclosure will subject him to a significant risk of retaliatory physical or mental harm. His claims of harassment are unpersuasive, as are his arguments that disclosure of his identity will violate his First Amendment rights. John Doe has not shown that his right to engage in anonymous political activity immunizes him from liability for alleged tortious conduct in this case. Most or all of the other pertinent factors militate against granting his request for anonymity. Finally, under the circumstances presented here, John Doe has not shown good cause for issuance of an order under NRCP 26(b)(1) preventing the disclosure of documents sought by Plaintiffs in their subpoenas to Defendants McNeely and 5 Alpha.

ACCORDINGLY, John Doe's *Renewed Motion for Protective Order* should be DENIED.

IT SHOULD, THEREFORE, BE ORDERED that Defendants McNeely and 5 Alpha produce to Plaintiffs, no later than July 9, 2024, the documents described in the subpoenas duces tecum previously served upon them in this action.

DATED: This 25th day of June, 2024.

/s/
Wesley M. Ayres
Discovery Commissioner

APPENDIX C — ORDER DENYING PETITION FOR WRIT OF PROHIBITION OF THE SUPREME COURT OF THE STATE OF NEVADA, FILED APRIL 9, 2025

IN THE SUPREME COURT
OF THE STATE OF NEVADA

No. 89277

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,

Respondents,

and

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

Real Parties in Interest.

Filed April 9, 2025

Appendix C

ORDER DENYING PETITION FOR WRIT OF PROHIBITION

This original petition for a writ of prohibition challenges a district court pretrial discovery order. "Petitioners carry the burden of demonstrating that extraordinary relief is warranted." *Pan v. Eighth Jud. Dist. Ct.*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004). We conclude that the conduct at issue was non-expressive in nature and not subject to First Amendment protection. For this reason, the district court did not abuse its discretion in affirming the discovery commissioner's recommendation. Accordingly, we

ORDER the petition DENIED.

/s/ Herndon, C.J.
Herndon

/s/ Pickering, J.
Pickering

/s/ Parraguirre, J.
Parraguirre

/s/ Bell, J.
Bell

/s/ Stiglich, J.
Stiglich

/s/ Cadish, J.
Cadish

/s/ Lee, J.
Lee

APPENDIX D — AMENDED COMPLAINT OF THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE, FILED FEBRUARY 23, 2023

IN THE SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

Case No.: CV22-02015
Dept. No. 15

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.

Filed February 23, 2023

AMENDED COMPLAINT
(Jury Trial Demanded)
(Exempt from Arbitration – N.A.R. 3 – Declaratory Relief, Amount in Controversy)

Plaintiffs Hillary Schieve ("Schieve") and Vaughn Hartung ("Hartung") complain and allege against David

McNeely ("McNeely"), 5 Alpha Industries, LLC ("5 Alpha Industries"), and the unnamed co-defendants (collectively "Defendants") as follows:

NATURE OF THE ACTION

1. In a time of heightened political tumult, the recent revelation of Defendants' actions still managed to shock the conscience. Private investigator David McNeely, at the request of a still unidentified third party, surreptitiously installed sophisticated GPS tracking devices on Schieve's and Hartung's personal vehicles, monitoring their every movement. This intrusive conduct is tortious, improper, and unequivocally barred by Nevada law.

2. Defendants, acting in concert with third parties, trespassed upon Plaintiffs' vehicles and/or private property to install the tracking devices and then received minute-by-minute location updates, in a continuous violation of their privacy.

3. The surveillance on Schieve continued for at least several weeks and continued for several months on Hartung. During this period of time, Defendants captured comprehensive information about the most private details of Plaintiffs' lives such as the times and locations of their visits to family members, religious institutions, personal and professional associations, and/or medical providers.

4. Defendants published and disseminated, or caused to be published and disseminated, this private information such that it is now publicly available to third parties.

5. As a result of Defendants' conduct, a website now exists that shows the public a map of hundreds of locations visited by Hartung over a seven-month period.

6. As a result of Defendants' conduct, photographs of Schieve were published, as were her whereabouts.

7. Schieve and Hartung, as long-time public servants, were acutely aware of the rise in violent attacks on elected officials across the country. Consequently, the discovery that they were being tracked caused them severe distress and anxiety.

8. Schieve, as a female elected official, faces a statistically higher likelihood of threats and harassment according to a Princeton University report, increasing the harm from Defendants' conduct.[1]

9. Defendants' conduct is especially unacceptable as Hartung's vehicles were frequently used by his wife and daughter. Thus, Defendants' conduct not only invaded Hartung's individual privacy, but also exposed his entire family to harm and unwarranted monitoring and surveillance.

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1. *ADL and Princeton's Bridging Divides Initiative Release New Report Tracking Threats and Harassment Against Local Officials*, ADL and Bridging Divides Initiative (Oct. 19, 2022), https://bridgingdivides.princeton.edu/sites/g/files/toruqf246/files/documents/THDataset_PressRelease_19Oct2022.pdf (finding that women officials were targeted 3.4 times more than men).

10. By tracking Plaintiffs, Defendants exposed them and their families to an unjustified and unwarranted risk of harassment, stalking, and bodily harm.

11. Upon information and belief, Defendants not only installed GPS tracking devices on Schieve's and Hartung's vehicles, but also installed similar tracking devices on the vehicles of multiple other prominent community members.

PARTIES

12. Schieve is an individual who is a resident of Washoe County, Nevada, and the duly-elected mayor of the City of Reno. Schieve has been elected as Reno's Mayor three times, most recently in 2022.

13. Hartung is an individual who is a resident of Washoe County, Nevada, and a dulyelected Washoe County Commissioner. Hartung has represented Washoe County District 4 since 2012 and currently serves as Chair of the Board of County Commissioners.

14. Defendant McNeely is an individual who works as a private investigator and is a resident of Washoe County, Nevada.

15. 5 Alpha Industries is a Nevada company that is registered to do business in Nevada as a domestic limited-liability company. Its registered agent is located at 2115 Parkway Drive, Reno, Nevada 89502.

16. There are other persons or entities, whether individuals, corporations, associations, or otherwise,

who are legally responsible for the acts, omissions, circumstances, happenings, and/or the damages or other relief requested by this Complaint. The true names and capacities of Does 1 through 10 and Roe Entities 11 through 20, inclusive, are currently unknown to Plaintiffs, who sue those defendants by such fictitious names. Plaintiffs intend to amend this Complaint to insert the proper names of the Doe and Roe defendants when such names and capacities become known to Plaintiffs.

JURISDICTION AND VENUE

17. This Court has jurisdiction over this action because the events giving rise to this action occurred in Washoe County, Nevada, and Plaintiffs seek recovery of damages in excess of $15,000.

18. Venue is proper in this Court under NRS 13.010.

GENERAL ALLEGATIONS

19. McNeely and 5 Alpha Industries, acting on behalf of a presently unidentified third party, trespassed on Schieve's and Hartung's vehicles and/or private property in order to install sophisticated GPS tracking devices on their personal vehicles, without their consent or knowledge.

20. The GPS tracking devices transmitted constant signals of Plaintiffs' exact locations, regardless of whether the vehicle was on public or private property.

21. This information was also used to photograph and/or surveil Plaintiffs.

22. Schieve only discovered her GPS tracking device by chance when a mechanic noticed it while working on Schieve's personal vehicle.

23. The tracking and surveillance of Schieve caused her, as it would cause any reasonable person, significant fear and distress. The tracking and surveillance has caused Schieve to alter her life and routine based on the additional risks Defendants' actions have created.

24. Hartung only discovered that GPS tracking devices had been placed on his vehicle(s) after being apprised of media and public-records reports that showed the locations of the vehicle(s) at his personal residence and other identifiable locations.

25. Hartung's tracked vehicle(s) were frequently used by his wife and daughter, including on trips where Hartung was not in the vehicle. The location data Defendants obtained included private and confidential locations visited by Hartung's family members.

26. The tracking and surveillance of Hartung and his family caused them, as it would cause any reasonable person, significant fear and distress. The tracking and surveillance has caused Hartung and his family to alter their lives and routines based on the additional risks Defendants' actions have created.

27. The United States Supreme Court held that the "Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'" *United States v. Jones*, 565 U.S. 400, 404 (2012) (five Justices concluding that privacy concerns would be raised by GPS tracking).

28. In a concurrence in *Jones*, Justice Sotomayor specifically wrote: "In cases involving even short-term monitoring, some unique attributes of GPS surveillance relevant to the Katz analysis will require particular attention. GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a *wealth of detail about her familial, political, professional, religious, and sexual associations*." *Id.* at 415 (Sotomayor, J., concurring) (emphasis added).

29. The District of Nevada explicitly held that the installation of a GPS tracker implicates the tort of invasion of privacy. *Ringelberg v. Vanguard Integrity Pros.-Nevada, Inc.*, No. 2:17-cv-01788-JAD-PAL, 2018 WL 6308737, at *8–9 (D. Nev. Dec. 3, 2018). In Ringelberg, the plaintiff pleaded a claim for invasion of privacy based on allegations that, among other things, a tracking device was placed on his car. *Id.* The district court rejected the defense's argument that plaintiff "had no reasonable expectation of privacy on the public or private streets he traveled or in his driveway" and held that there was no basis to grant summary judgment against plaintiff on the privacy claim. *Id.*

30. Based on the foregoing facts, Plaintiffs are entitled to the relief set forth below.

Appendix D

FIRST CAUSE OF ACTION

(Invasion of Privacy – Intrusion upon Seclusion)

31. Plaintiffs incorporate the allegations contained in the preceding and following paragraphs as if set forth verbatim herein.

32. Plaintiffs had an objective and subjective expectation of privacy in the information Defendants obtained, including but not limited to their locations, their activities, and the movement of their personal vehicles.

33. Plaintiffs did not consent to Defendants' actions.

34. Defendants' disclosure of the private information obtained from the GPS tracking devices was offensive and objectionable to a reasonable person.

35. The disclosed information was not public and was not capable of determination from public sources.

36. As a direct and proximate result of Defendants' actions, Plaintiffs have been damaged in excess of $15,000.00 and have suffered anguish and distress. Defendants' actions entailed oppression, fraud, or malice warranting the imposition of exemplary and punitive damages.

37. It has been necessary for Plaintiffs to retain attorneys to bring this Complaint. Accordingly, Plaintiffs are entitled to recover their reasonable attorney's fees and costs incurred herein.

Appendix D

SECOND CAUSE OF ACTION

**(Invasion of Privacy –
Public Disclosure of Private Facts)**

38. Plaintiffs incorporate the allegations contained in the preceding and following paragraphs as if set forth verbatim herein.

39. Plaintiffs had an objective and subjective expectation of privacy in the information Defendants obtained, including in their locations, their activities, and the movement of their personal vehicles.

40. Plaintiffs did not consent to Defendants' actions.

41. Defendants published or caused to be published private information about Plaintiffs, including but not limited to their locations, their activities, and the movement of their personal vehicles.

42. No legitimate public interest was served by having these private facts disclosed.

43. Defendants' disclosure of the private information obtained from the GPS tracking device was offensive and objectionable to a reasonable person.

44. The disclosed information was not public and was not capable of determination from public sources.

45. As a result of Defendants' surveillance of Plaintiffs, private information concerning Plaintiffs

has been published publicly, including but not limited to photographs, the locations of their and their family's trips, and other locations such as religious institutions, personal and professional associations, and/or medical providers.

46. As a direct and proximate result of Defendants' actions, Plaintiffs have been damaged in excess of $15,000.00 and have suffered anguish and distress. Defendants' actions entailed oppression, fraud, or malice warranting the imposition of exemplary and punitive damages.

47. It has been necessary for Plaintiffs to retain attorneys to bring this Complaint. Accordingly, Plaintiffs are entitled to recover their reasonable attorney's fees and costs incurred herein.

THIRD CAUSE OF ACTION

(Violation of NRS Chapter 200, Anti-Doxxing)

48. Plaintiffs incorporate the allegations contained in the preceding and following paragraphs as if set forth verbatim herein.

49. Defendants obtained and disseminated personal identifying information and sensitive information about Plaintiffs in violation of NRS Chapter 200 and AB 296 (2021).

50. The information Defendants obtained included non-public information concerning Plaintiffs' lives, their

activities, their transactions, and their trips to locations such as religious institutions, personal and professional associations, and/or medical providers.

51. Plaintiffs did not consent to Defendants' actions.

52. Defendants intended to cause harm to Plaintiffs and knew or recklessly disregarded the reasonable likelihood that the dissemination of Plaintiffs' location could lead to death, bodily injury, harassment, stalking, financial loss, or a substantial life disruption.

53. The dissemination of the information Defendants obtained would cause a reasonable person to fear death, bodily injury, harassment, stalking, financial loss, or a substantial life disruption.

54. The information Defendants obtained did identify and could be used to identify and track Plaintiffs.

55. No justification or privilege protects Defendants' conduct.

56. Defendants' failure to exercise reasonable care was the actual and proximate cause of Plaintiffs' injuries, damages, and losses, which are in excess of $15,000.00.

57. It has been necessary for Plaintiffs to retain attorneys to bring this Complaint. Accordingly, Plaintiffs are entitled to recover their reasonable attorney's fees and costs incurred herein.

Appendix D

FOURTH CAUSE OF ACTION

(Negligence)

58. Plaintiffs incorporate the allegations contained in the preceding and following paragraphs as if set forth verbatim herein.

59. McNeely and 5 Alpha Industries had a duty to exercise reasonable care in acting as a private investigator in compliance with Nevada law.

60. Defendants had a duty to prevent foreseeable harm to Plaintiffs, but by placing the GPS tracking devices on Plaintiffs' vehicles, Defendants breached this duty and exposed Plaintiffs to a serious risk of harm.

61. McNeely and 5 Alpha Industries had a special relationship with Plaintiffs by taking the affirmative act of tracking their personal vehicles.

62. McNeely and 5 Alpha Industries had a special relationship with the unnamed codefendants by virtue of being hired to perform tasks for them.

63. Defendants violated or conspired to violate multiple Nevada statutes including NRS 200.575, NRS 199.300, and others.

64. Defendants used electronic means to publish, display, or distribute information in a manner that substantially increased the risk of harm or violence to Plaintiffs.

65. Defendants are jointly and severally liable to Plaintiffs.

66. Defendants' failure to exercise reasonable care was the actual and proximate cause of Plaintiffs' injuries, damages, and losses, which are in excess of $15,000.00.

67. It has been necessary for Plaintiffs to retain attorneys to bring this Complaint. Accordingly, Plaintiffs are entitled to recover their reasonable attorney's fees and costs incurred herein.

FIFTH CAUSE OF ACTION

(Trespass)

68. Plaintiffs incorporate the allegations contained in the preceding and following paragraphs as if set forth verbatim herein.

69. Plaintiffs were the lawful owner of their vehicles and the private property on which they were stored.

70. Defendants intentionally entered on Plaintiffs' vehicles and/or private property to place a GPS tracking device on Plaintiffs' vehicles or caused this to be done.

71. Defendants caused actual or nominal damage to Plaintiffs' property.

72. Defendants' actions entailed oppression, fraud, or malice warranting the imposition of exemplary and punitive damages.

73. It has been necessary for Plaintiffs to retain attorneys to bring this Complaint. Accordingly, Plaintiffs are entitled to recover their reasonable attorney's fees and costs incurred herein.

SIXTH CAUSE OF ACTION

(Civil Conspiracy)

74. Plaintiffs incorporate the allegations contained in the preceding and following paragraphs as if set forth verbatim herein.

75. Defendants purposefully and maliciously acted in concert with each other, and with others, to invade the privacy of Plaintiffs.

76. Defendants purposefully and maliciously intended to harm Plaintiffs.

77. Through their concerted action, Defendants caused damages to Plaintiffs as set forth by all the facts as stated herein.

78. Plaintiffs have sustained and will continue to suffer damages in excess of $15,000.00 as a direct and proximate result of Defendants' conspiracy.

79. Plaintiffs are entitled to exemplary and punitive damages as a result of Defendants' oppression, fraud, or malice.

Appendix D

SEVENTH CAUSE OF ACTION

(Aiding and Abetting)

80. Plaintiffs incorporate the allegations contained in the preceding and following paragraphs as if set forth verbatim herein.

81. Defendants, and each of them, were aware of the conduct against Plaintiffs and actively or passively participated in the conduct by aiding one or more of the other named or unnamed Defendants.

82. Defendants substantially assisted one another to accomplish the wrongful acts committed against Plaintiffs.

83. Defendants, and each of them, were aware of the conduct and intentions of the other Defendants.

84. Through their concerted action, Defendants caused damages to Plaintiffs as set forth by all the facts as stated herein.

85. Plaintiffs have sustained and will continue to suffer damages in excess of $15,000.00 as a direct and proximate result of Defendants' aiding and abetting.

86. Plaintiffs are entitled to exemplary and punitive damages as a result of Defendants' oppression, fraud, or malice.

Appendix D

EIGHTH CAUSE OF ACTION

(Declaratory Relief)

87. Plaintiffs incorporate the allegations contained in the preceding and following paragraphs as if set forth verbatim herein.

88. A justiciable controversy exists between Plaintiffs and Defendants.

89. Defendants have taken the position that their actions were lawful and may be repeated at any time.

90. Plaintiffs assert that Defendants' conduct was tortious under Nevada law and specifically in violation of NRS 200.575, NRS 200.610-690, NRS 199.300, and the provisions of AB 296.

91. Plaintiffs' interests are adverse to Defendants' interests in this dispute and are ripe for judicial determination.

92. Plaintiffs are entitled to a judicial determination that Defendants' conduct violates Nevada law and the Nevada statutes identified in this Complaint.

WHEREFORE, Plaintiffs request relief as follows:

1. For judgment in favor of Plaintiffs and against Defendants;

2. For preliminary and permanent injunctive relief;

3. For declaratory relief;

4. For damages in an amount in excess of $15,000.00 for each cause of action to be determined at trial;

5. For exemplary and punitive damages in an amount no less than three times the amount awarded to Plaintiffs for compensatory damages;

6. For pre-judgment and post-judgment interest as provided by law;

7. For an award of attorney's fees and costs as special damages in accordance with evidence;

8. For an award of Plaintiffs' costs, disbursements, and attorney's fees incurred in this action; and

9. For such other and further relief as the Court may deem just and proper.

AFFIRMATION PURSUANT TO NRS 239B.030

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

Appendix D

Dated: February 23, 2023

McDONALD CARANO LLP

By: /s/ Adam Hosmer-Henner
Adam Hosmer-Henner (NSBN 12779)
Chelsea Latino (NSBN 14227)
Philip Mannelly (NSBN 14236)
Jane Susskind (NSBN 15099)
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Counsel for Plaintiffs