No. ______

IN THE

Supreme Court of the United States

JOSHUA MAST, STEPHANIE MAST, & RICHARD MAST,
Petitioners,

v.

JOHN DOE & JANE DOE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

At the outset of this years-long, multi-venue dispute, the district court entered an *ex parte* order that bars Petitioners Joshua Mast, Stephanie Mast, and Richard Mast ("the Masts") from disclosing any information that might identify Respondents, even indirectly, under intermediate scrutiny, on the ground that identification would pose a safety risk to Respondents and unspecified family members.

The Fourth Circuit held that the order is a content-based prior restraint subject to strict scrutiny, but nevertheless affirmed on an entirely different rationale: that the United States has a compelling interest in protecting the confidentiality of foreign nationals *perceived* as American collaborators to preserve the Nation's ability to recruit intelligence assets abroad.

No party ever advanced that rationale; the United States never asserted it; and the district court never invoked it. The Fourth Circuit also summarily concluded that the prior restraint was narrowly tailored to serve this novel compelling interest.

The Question Presented is:

> Whether the Fourth Circuit erred in affirming the district court's content-based prior restraint under strict scrutiny based on a novel public-interest rationale that the parties, the district court, and the United States never presented.

PARTIES TO THE PROCEEDINGS

Petitioners Joshua Mast, Stephanie Mast, and Richard Mast are Defendants-Appellants below. Respondents John Doe and Jane Doe are Plaintiffs-Appellees below.

Additional parties to the proceeding below are as follows: Kimberley Motley, who is a Defendant in the underlying district court proceedings; Ahmad Osmani, who was a Defendant in the underlying district court proceeding, but against whom Respondents voluntarily dismissed their claims; U.S. Secretary of State Antony Blinken and U.S. Secretary of Defense General Llyod Austin, who were named as "Nominal Defendants" in the Complaint, but whom Respondents voluntarily dismissed from the case; the Pipe Hitter Foundation, Inc., which filed a motion to quash third-party discovery; and Jonathan Mast, who appeared in the district court as a respondent to a contempt motion filed by Respondents.

Respondents also purported to bring claims on behalf of Joshua & Stephanie Mast's adoptive daughter, whom they styled as "Baby Doe, a Citizen of Afghanistan, Currently Residing in North Carolina, by and Though Next Friends, John and Jane Doe." The district court held that Respondents lacked standing to bring claims on behalf of the Child and dismissed them accordingly.

STATEMENT OF RELATED PROCEEDINGS

This case is directly related to the following proceedings:

Doe v. *Mast*, No. 24-1900 (CA4)

Doe v. *Mast*, No. 3:22-cv-00049 (W.D. Va.)

The case is indirectly related to the following proceedings and their related proceedings:

Baby L. v. *Esper,* No. 3:22-cv-00009 (W.D. Va.)

A.A. v. *Mast*, No. 26-164 (U.S.)

Mast v. *A.A.*, No. 240707 (Va.)

A.A. v. *J.M.*, Nos. 0876-23-2, 0953-23-2, 1855-22-2, 0940-23-2 (Va. Ct. App.)

A.A. v. *J.M.*, No. CL22-186 (Va. Cir. Ct., Fluvanna Cnty.)

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PETITION FOR A WRIT OF CERTIORARI

The Fourth Circuit panel below mis-applied strict scrutiny and violated the party-presentation principle by upholding a prior restraint on speech based on a *post hoc* rationale that no party argued and that the district court never considered. "Federal courts adhere to the principle of party presentation." *Margolin* v. *Nat'l Ass'n of Immigr. Judges*, 146 S. Ct. 1285, 1288 (2026); *accord Clark* v. *Sweeney*, 607 U.S. 7, 9 (2025); *United States* v. *Sineneng-Smith*, 590 U.S. 371, 375 (2020). That principle carries special force where, as here, the rationale supplies the compelling interest necessary to sustain a content-based prior restraint—which "bear[s] a heavy presumption against its constitutional validity," *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963), and represents "the most serious and the least tolerable infringement on First Amendment rights," *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 559 (1976).

The district court entered an *ex parte* order forbidding Petitioners Joshua Mast, Stephanie Mast, and Richard Mast from disclosing any information that directly or indirectly identifies Respondents, premised on the personal safety of Respondents and their family members. The district court did not apply strict scrutiny, and the Masts appealed. A divided panel of the Fourth Circuit agreed that the order is a content-based prior restraint subject to strict scrutiny. But rather than review the rationale the district court actually gave, or remand for the district court to apply the correct standard in the first instance, the panel substituted one of its own rationale: that the United States has a compelling national-security interest in protecting the confidentiality of foreign nationals perceived as American collaborators, in order to preserve the Nation's ability to recruit intelligence assets abroad. No party—not Respondents, and not the United States, whose interest the panel invoked—ever advanced that rationale. The district court never evaluated it. And the panel resolved the entire strict-scrutiny inquiry on this new theory without remanding for adversarial testing.

This Court should grant review because this case presents an important question implicating two principles that both ensure that speech cases—among the most sensitive constitutional cases in American jurisprudence—are litigated fairly and rigorously. Both the party-presentation principle and the rule against *post hoc* rationales in strict scrutiny ensure that litigants challenging a prior restraint have a fair opportunity to know why their speech is being restricted and to argue against it. And both implicate divisions among the lower courts that warrant this Court's review and guidance.

Alternatively, or as a preliminary step before considering plenary review, this Court should GVR—grant, vacate, and remand—in light of *Margolin*, which was issued on May 26, 2026, over a month after the Fourth Circuit issued the decision below and about a week after it denied rehearing. In *Margolin*, this Court once again (*see Clark*, 607 U.S. at 9) reversed and remanded a decision from the Fourth Circuit that violated the party-presentation principle by invoking a *sua sponte* rationale that no party had argued for. *See* 146 S. Ct. at 1288. Following a GVR in light of *Margolin*, Petitioners would have a first opportunity to address on the merits the novel national-security rationale that the Fourth Circuit relied on below, either sharpening any issues that might still warrant this Court's review or obviating the need for this Court's plenary review altogether.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 173 F.4th 524 and reproduced at Pet. App. B, following the Court of Appeals' judgment at Pet. App. A. The order of the Fourth Circuit denying rehearing en banc and panel rehearing is unreported and reproduced at Pet. App. C. The opinion and order of the United States District Court for the Western District of Virginia denying the Masts' motions to vacate or modify the protective order, and holding Joshua Mast in civil contempt, is reported at *Doe* v. *Mast*, 745 F. Supp. 3d 399 (W.D. Va. 2024), and reproduced at Pet. App. D. The district court's original order granting the protective order, entered *ex parte* in September 2022, is unreported and reproduced at Pet. App. E.

JURISDICTION

The Fourth Circuit entered judgment on April 22, 2026. Pet. App. A. Petitioners timely sought rehearing en banc and panel rehearing on May 6, 2026, which the Fourth Circuit denied on May 20, 2026. Pet. App. C. This petition is filed within 90 days of the denial of rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part:

> "Congress shall make no law * * * abridging the freedom of speech, or of the press * * * ." U.S. CONST. amend. I.

STATEMENT OF THE CASE

A. The Adoption, Litigation, & Protective Order

Joshua and Stephanie Mast are the loving adoptive parents of a young girl ("the Child," referred to below as "Baby Doe")[1] whom U.S. Army Rangers rescued as a severely injured orphan from a battlefield in Afghanistan. The Child's mother died during the raid of a foreign fighter training camp, attempting to kill American soldiers and seriously wounding the Child who was left for dead. Army Rangers intervened to protect the Child and brought her to a U.S. military hospital. Major Joshua Mast (then Captain) met the Child while he was deployed in Afghanistan as a Marine Corps Judge Advocate, and she was being treated for her injuries.

Out of concern for the Child and her future, Joshua and his wife Stephanie, with the assistance of Joshua's

[1] Respondents filed suit purporting to bring claims on behalf of "Baby Doe," but the district court dismissed them for lack of standing, and the Virginia Supreme Court has dismissed with prejudice their challenge to the adoption.

brother and their attorney, Richard Mast, took steps to bring the Child to the United States. Those efforts culminated in a Virginia adoption order, finalized in December 2020, and a heroic effort to extract the Child, along with John and Jane Doe (Respondents here), from Afghanistan as it fell to the Taliban.

After the Child and the Does arrived in the United States, the Masts took custody of the Child pursuant to a Virginia adoption order. The Supreme Court of Virginia recently upheld that adoption order, ruling that Respondents were statutorily barred from challenging it, directly or indirectly, under Virginia Code § 63.2-1216. *Mast* v. *A.A.*, 925 S.E.2d 665 (Va. 2026).

The Masts' adoptive daughter turned seven this summer and has lived happily at home for nearly five years with her parents and four adoptive siblings, where she has received the love and care that she needs and deserves. The Masts also ensured that John and Jane Doe were evacuated from Afghanistan, in gratitude for their help in evacuating the Child, and that they made it to the United States where they now reside as asylees.

In September 2022, while their state-court challenge to the Masts' adoption was pending, Respondents brought this federal suit against the Masts and others, including their attorney (and Joshua's brother), Richard Mast (another Petitioner here). The Does sought millions of dollars in damages, as well as a series of declaratory judgments that the district court has rejected.

As relevant here, in filing their tort suit in federal court, the Does swiftly moved for a protective order prohibiting Petitioners from publicly disclosing Respondents' identities, as well as the identity of the Child, either directly or indirectly. The district court granted the protective order *ex parte* on September 13, 2022. Pet. App. E. As entered, the order provides:

> [Petitioners] and their counsel and representatives are prohibited from disclosing any information that directly *or indirectly* identifies [Respondents or the Child] and their family members *to any person* * * * unless that person first executes a non-disclosure agreement enforceable through the contempt sanction.

Pet. App. E, at 94 (emphasis added). Because the Does originally purported to bring claims on behalf of the Child herself (which the District Court has since dismissed due to their lack of standing), that prohibition includes the direct or indirect "identification" of the Masts' own adoptive daughter.

Despite seeking anonymity, Respondents themselves engaged with the media, including sitting for interviews; publicly named and criticized the Masts; and publicized their own account of the case, which led reporters to Afghanistan in February 2023, where the Associated Press interviewed, recorded, photographed, and published images of the Does' relatives while Taliban escorts were present.[2]

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[2] R. Butt *et al.*, *A baby was found in the rubble of a US raid in Afghanistan. But who exactly was killed and why?*, ASSOCIATED PRESS (Updated August 4, 2023), https://apnews.com/article/afghanistan-raid-marine-orphan-custody-

(cont'd)

B. Relevant District Court Proceedings

With the *ex parte* protective order in place, Respondents launched a media campaign attacking the Masts, in connection with which both they and their lawyers gave on-the-records statements to the press. *See* Pet. App. B, at 9 & n.3; Pet. App. D, at 45. Soon thereafter, the Taliban issued a statement denouncing Joshua Mast by name. Pet. App. D, at 45–46. As it became clear that Plaintiffs were using their pseudonymity and the speech restrictions in the *ex parte* protective order as a shield in an asymmetrical media blitz, and that it was hamstringing the Masts from investigating and preparing their defense, the Masts and Richard Mast filed motions to lift or modify the protective order. They raised a number of issues, including that the *ex parte* protective order's speech restrictions constitute an unconstitutional prior restraint that fails under strict scrutiny. The District Court did not rule on these motions for a year and a half. Nevertheless, in the meantime, Respondents twice filed motions seeking to have the Masts held in contempt for purported violations based on their alleged "identification" of the Child (not John Doe or Jane Doe) to third parties who did not sign an NDA.

On August 16, 2024, the district court denied the motions and held Joshua Mast in civil contempt for sharing a photograph of his adoptive daughter with a non-profit organization. *Doe* v. *Mast*, 745 F. Supp. 3d

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1e73bba608994a53fca37b904dfd9a81 (last visited August 17, 2026).

399 (W.D. Va. 2024); Pet. App. D.[3] In denying relief, the district court framed the relevant compelling interest as the personal safety of Respondents and their family members in Afghanistan—concluding that "disclosure of [Respondents'] identities and identifying information would pose a substantial risk to the physical safety of [Respondents] and other innocent third-parties." Pet. App. D, at 43; Pet. App. E, at 93.

The District Court held that it was not required to apply strict scrutiny standard, and instead that the entire Protective Order need only be assessed under the standard articulated in *James* v. *Jacobson,* 6 F.3d 233 (CA4 1993), for granting leave to use pseudonyms. Pet. App. D, at 51–53. The district court did not rely on, or even mention, any interest of the United States government in protecting the confidentiality of foreign nationals to preserve its capacity to recruit intelligence assets. Neither Respondents nor the United States, though federal officials were named as defendants at the outset of the case, ever asked the district court to consider such an interest.

The Masts timely appealed the denial of their motions to lift the order.

C. The Fourth Circuit's Decision

On April 22, 2026, a divided panel of the Fourth Circuit affirmed. Pet. App. A, B. Judge Richardson, writing for the majority and joined by Chief Judge

[3] The contempt portion of the order is not at issue in this appeal. The district court to date has not entered any sanction against Joshua Mast or his non-party brother who was also held to be in contempt of the protective order.

Diaz, agreed that the protective order is a content-based prior restraint subject to strict scrutiny. Pet. App. B, at 16–21. But the panel did not evaluate—let alone affirm based on—the personal-safety rationale the district court actually adopted. Instead, the panel held that the order survives strict scrutiny because it serves "the Federal Government's compelling interest in national security—specifically, the interest in protecting foreign nationals perceived as U.S. collaborators to maintain the credibility necessary for future intelligence recruitment." Pet. App. B, at 16–17;

In a footnote, the court acknowledged that it was relying on a different rationale than the district court:

> While the district court framed the relevant compelling interest as the personal safety of the Does and their family members in Afghanistan, its undisputed factual findings also implicate the government's compelling interest in national security. These findings establish that disclosure of the Does' identities would undermine the government's ability to protect intelligence sources and maintain credibility necessary for future recruitment.

Pet. App. B, at 26 n.15.

In support of that new rationale, the panel cited a series of cases involving the United States government itself as a party asserting its own national-security interests—cases neither the district court nor Respondents ever cited, and that the Masts never had an opportunity to address. Pet. App. B, at 21–25 (citing *United States* v. *Zubaydah*, 595 U.S. 195 (2022); *C.I.A.* v. *Sims*, 471 U.S. 159 (1985); *Haig* v. *Agee*, 453 U.S.

280 (1981); *Snepp* v. *United States*, 444 U.S. 507 (1980); *Edgar* v. *Haines*, 2 F.4th 298 (CA4 2021); *United States* v. *Smith*, 780 F.2d 1102 (CA4 1985)). The court also invoked "[c]ommon sense," which "tells us that establishing the trust necessary to recruit actual collaborators requires the United States to protect those perceived as collaborators." Pet. App. B, at 25. Without citation, the court opined that "trust is directly threatened when our government allows those who may be perceived as collaborators—like the Does—to be publicly identified" and that "identification of the Does' families abroad would * * * concretely impair the credibility on which sensitive cooperation depends." *Ibid.* The court finally asserted—again, without citation—that, "[w]ithout the protective order, the Masts' ability to freely disclose the Does' identities would impair the government's capacity to recruit and retain cooperating informants, which, in turn, would weaken the United States' foreign policy and national security." Pet. App. B, at 25–26. The panel then went on to address narrow tailoring and the least-restrictive-means requirement. Pet. App. B, at 26–30. Neither the parties nor the district court had ever addressed whether the *ex parte* protective order was narrowly tailored or the least restrictive means to serve a compelling national-security interest in protecting perceived collaborators. The panel concluded that it satisfied both requirements. *Ibid.*

Judge King dissented on jurisdictional grounds, concluding that the court lacked appellate jurisdiction; the majority disagreed. Pet. App. B, at 35–36 (King, J., dissenting). He expressly declined to express a view on the merits. Pet. App. B, at 36 n.*.

The Masts timely petitioned for rehearing *en banc* or, alternatively, panel rehearing, arguing that the panel's decision conflicts with this Court's party-presentation precedents and with decisions of other Courts of Appeals rejecting *post hoc* governmental rationales under strict scrutiny, and that the panel's approach presents questions of exceptional importance. The Masts explained that, at most, the panel should have held that strict scrutiny applies and remanded to the district court to evaluate the national-security rationale in the first instance, on a properly developed adversarial record. The Fourth Circuit denied rehearing on May 20, 2026. Pet. App. C.

REASONS FOR GRANTING THE PETITION

I. The Fourth Circuit's Decision to Affirm on a Rationale Never Presented by the Parties or Invoked by the District Court Conflicts with this Court's Precedent and Warrants Review.

This Court has been vigilant in enforcing the principle of party presentation, including in two recent cases involving the Fourth Circuit. *See Margolin* v. *Nat'l Ass'n of Immigr. Judges*, 146 S. Ct. 1285, 1288 (2026); *Clark* v. *Sweeney*, 607 U.S. 7, 9 (2025). This case illustrates that the problem persists.

A. The Party Presentation Principle Bars Appellate Courts from Supplying Novel, *Sua Sponte* Rationales for Affirmance.

"In our adversary system * * * we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Greenlaw* v. *United States*, 554 U.S. 237, 243 (2008); *see also United States* v. *Sineneng-Smith*, 590 U.S. 371, 375–76 (2020). That principle reflects a considered judgment about the proper role of appellate courts: "courts 'call balls and strikes'; they don't get a turn at bat." It is a corollary of "the general rule * * * that a federal appellate court does not consider an issue not passed upon below." *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976). Both rules exist to ensure that the party against whom a new theory is deployed has a fair and meaningful opportunity to respond to it with evidence and argument. *Ibid.*

The Fourth Circuit itself has been reversed in each of the last two Terms for transgressing this principle. In *Clark*, this Court reversed a Fourth Circuit decision in which a panel granted habeas relief based on a claim that the prisoner never asserted. *See* 607 U.S. at 9–10. Then, earlier this year (and after the panel decision below), this Court reversed a Fourth Circuit decision in which the court adopted a novel theory about jurisdiction under the Civil Service Reform Act that no party had raised. *See Margolin*, 146 S. Ct. at 1287–88. Individual panels of the Fourth Circuit have sometimes honored the party-presentation principle. *See, e.g.*, *Beaudett* v. *City of Hampton*, 775 F.2d 1274, 1278 (CA4 1985) ("Principles requiring generous construction of *pro se* complaints * * * do[] not require those courts to conjure up questions never squarely presented to them.").[4]

But the Fourth Circuit panel below nevertheless departed from this settled practice. The district court's rationale rested on the personal safety of Respondents and their family members—a fact-bound conclusion about the risk of physical harm to identified individuals. Pet. App. E. The panel's rationale rests on an entirely different theory: the United States government's institutional interest in maintaining the credibility of its assurances to foreign intelligence assets, so as to facilitate future recruitment. Pet. App. B, at 21–24. These are categorically different interests, implicating different facts, different legal standards, and different parties. No party ever asked the panel to adopt this national-security rationale. Respondents—the parties who sought and defended the protective order and who bear the burden under strict scrutiny—never argued that the order serves the government's intelligence-recruitment interest. And the United States, though named as a defendant at the outset of

[4] The Fourth Circuit has also recognized the related principle that issues not passed upon below are generally best left for the district court to address in the first instance on remand. *See, e.g.*, *Tederick* v. *LoanCare, LLC*, 168 F.4th 154, 173 (CA4 2026) ("Given that we are a 'court of review, not of first view,' * * * we decline to affirm on [an alternative] basis, and * * * leave that issue for the remand."); *Long* v. *Bondi*, 151 F.4th 503, 519 (CA4 2025) (declining to reach an alternative ground that "would require extensive analysis of issues never addressed by the district court, which is better positioned to consider them in the first instance") (quoting *Hulsey* v. *Cisa*, 947 F.3d 246, 252 (CA4 2020));

the case, never advocated for the order on any ground, let alone that one.

By supplying a compelling-interest rationale that no party advanced, the panel relieved Respondents of their burden under strict scrutiny and did so using authority—*United States* v. *Zubaydah*, 595 U.S. 195 (2022); *C.I.A.* v. *Sims*, 471 U.S. 159 (1985); *Haig* v. *Agee*, 453 U.S. 280 (1981); *Snepp* v. *United States*, 444 U.S. 507 (1980); *Edgar* v. *Haines*, 2 F.4th 298 (CA4 2021) ; and *United States* v. *Smith*, 780 F.2d 1102 (CA4 1985), *see* Pet. App. B, at 21–25—that neither the district court nor Respondents ever cited, and that the Masts never had occasion to address. The Court then went on to address narrow tailoring and the least-restrictive means requirement, which neither the parties nor the district court had ever addressed in connection with a compelling national-security interest in protecting perceived collaborators. Pet. App. B, at 26–30.

This is precisely the harm that the party presentation principle exists to prevent: a party is deprived of the chance to test, through briefing, argument, and record development, the very theory on which the judgment against it ultimately rests. *Singleton*, 428 U.S. at 120.

B. The Courts of Appeals Are Divided on the Scope of the Party Presentation Principle, and the Fourth Circuit's Departure Warrants Review.

Nearly every court of appeals to address the question has faithfully applied the party presentation principle. *See Zhou* v. *Desktop Metal, Inc.*, 120 F.4th

278, 289 (CA1 2024); *Debique* v. *Garland*, 58 F.4th 676, 684 (CA2 2023); *United States* v. *Payo*, 135 F.4th 99, 106 (CA3 2025); *United States* v. *Cockerham*, 162 F.4th 500, 509 (CA5 2025); *Castañon-Nava* v. *U.S. Dep't of Homeland Sec.*, 161 F.4th 1048, 1057 (CA7 2025); *Christianson* v. *McLean County*, 176 F.4th 1076, 1087 (CA8 2026); *In re Nance*, 156 F.4th 961, 969–70 (CA9 2025); *Morphew* v. *Chaffee Cnty., Colo.*, 172 F.4th 802, 820 (CA10 2026); *U.S. Sec. & Exch. Comm'n* v. *Spartan Sec. Grp., Ltd.*, 164 F.4th 1231, 1274 (CA11 2026); *Doe* v. *Blanche*, 172 F.4th 901, 912 (CADC 2026); *Astellas Pharma, Inc.* v. *Sandoz Inc.*, 117 F.4th 1371, 1377 (CA Fed. 2024).

The Fourth Circuit, by contrast, has repeatedly departed from that principle, even beyond *Margolin* and *Clark*. *See Anderson* v. *Crouch*, 169 F.4th 474, 494–95 (CA4 2026) (declining to apply the party presentation principle in light of intervening precedent from this Court); *Moore* v. *Maryland*, 163 F.4th 828, 851 (CA4 2026) (Niemeyer, J., dissenting) (criticizing the majority's failure to enforce the principle in a habeas case); *Su* v. *Med. Staffing of America, LLC*, 2023 WL 3735221, at *3 (CA4 May 31, 2023) (Richardson, J., dissenting) (criticizing the majority's failure to enforce the principle in a case under the Fair Labor Standards Act). The panel's decision here is the latest and most consequential instance of that pattern.

This time, the Fourth Circuit has not just elided party presentation in an ordinary civil context; it has done so to sustain a content-based prior restraint on speech, where the stakes of departing from settled appellate practice are highest. The Sixth Circuit has also recently strayed from the doctrine. *See Gray* v. *State Farm Mut. Auto. Ins. Co.*, 159 F.4th 1024, 1057 (CA6 2025) (Readler, J., dissenting) ("Today's case amply demonstrates how casting aside these party presentation principles to instead frame a party's case in whatever way we see fit yields a wave of unending problems."). Thus, while the Fourth Circuit has notably departed from the party presentation principle in a number of recent cases, the issue is not isolated to the Fourth Circuit.

This recurring and worsening problem warrants this Court's intervention. The party presentation principle is foundational to the adversarial system; it should not turn on which circuit or panel hears the appeal. Where, as here, a panel's departure from the principle determines the outcome of a First Amendment challenge to a prior restraint, the need for uniform application is at its highest.

C. This Case Is an Ideal Vehicle to Address the Issue.

This case cleanly presents the party presentation question without vehicle complications. The panel itself acknowledged, in a footnote, that it was substituting its own rationale for the one the district court gave. Pet. App. B, at 26 n.15. There is no dispute about what rationale the district court adopted, what rationale the panel adopted instead, or that the two are different. The question whether an appellate court may supply a new compelling-interest theory to sustain a prior restraint—without any party having advanced it and without remanding for the district court to consider it—is a pure question of appellate procedure that this Court can resolve on this record without further factual development. And because the case also implicates the First Amendment, this Court can use it to clarify both the general party presentation principle and its specific application in the strict-scrutiny, prior-restraint context.

II. The Fourth Circuit Erred by Sustaining a Prior Restraint Under Strict Scrutiny Based on a Purported Compelling Interest That the District Court Neither Invoked in Imposing the Restriction Nor Evaluated.

The fact that this case arises from a challenge to a prior restraint on speech, which the Court of Appeals explicitly upheld under strict scrutiny provides another compelling reason for this Court's review. And it makes the Fourth Circuit's substitution of its own judgment for that of the parties and the district court all the more concerning.

A. Strict Scrutiny Turns on the Compelling Interest Invoked When the Speech Restriction Was Imposed, Not an Appellate Court's *Post Hoc* Justification.

Prior restraints on speech "bear[] a heavy presumption against [their] constitutional validity," *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963), and are "the most serious and the least tolerable infringement on First Amendment rights," *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 559 (1976). The party seeking or defending such a restraint therefore "carries a heavy burden of showing justification for the imposition of such a restraint." *N.Y. Times Co.* v. *United States*, 403 U.S. 713, 714 (1971) (per curiam) (quotation omitted). That burden belongs to the party defending the restriction—not to the reviewing court, and not to a court of appeals reviewing the district court's work.

This principle has particular force where, as here, the compelling interest offered on appeal was never offered below. A governmental interest asserted to justify a restriction on speech "must be genuine, not hypothesized or invented post hoc in response to litigation." *Agudath Israel of Am.* v. *Cuomo*, 983 F.3d 620, 633 (CA2 2020) (quoting *United States* v. *Virginia*, 518 U.S. 515, 533 (1996)). Courts "ordinarily reject '*post hoc* rationalizations' for government action and instead rely on the 'basis [for the regulation] articulated by the agency itself.'" *Real Alternatives, Inc.* v. *Sec'y Dep't of Health & Hum. Servs.*, 867 F.3d 338, 387 n.35 (CA3 2017) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983)). And when a court determines for the first time that strict scrutiny applies, the question whether the challenged action can survive that standard "should be addressed in the first instance by the lower courts." *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 238–39 (1995).

The panel's decision violates each of these principles at once. The interest the panel invoked—the government's institutional interest in intelligence-recruitment credibility—was not "articulated by the agency itself"; it was never articulated by the government at all. *Real Alternatives*, 867 F.3d at 387 n.35. It was not the rationale Respondents offered in seeking the restraint, nor the rationale the district court relied on in granting it. Pet. App. D, at 43; Pet.

App. E, at 93. It was, in every relevant sense, "hypothesized or invented *post hoc* in response to litigation"—by the panel itself, on appeal, years after the restraint issued. *Agudath Israel*, 983 F.3d at 633. Having determined that strict scrutiny governs a rationale the district court never evaluated, the panel should have remanded for the district court to conduct that evaluation in the first instance, as *Adarand* instructs. 515 U.S. at 238–39.

B. The Panel's *Post Hoc* Rationalization, Invoked *Sua Sponte*, Deprived Petitioners of Any Opportunity for Adversarial Testing of the Speech Restriction.

Even if a compelling interest in intelligence-recruitment credibility could, on a properly developed record, justify a restraint like this one, the panel's decision to resolve that question itself, rather than to remand, deprived the Masts of the district court's considered judgment on at least three issues: (1) whether the interest the panel identified is actually established on this record; (2) whether the order as written is narrowly tailored to that specific interest, as opposed to the personal-safety interest the district court actually found; and (3) whether less restrictive alternatives exist to serve that specific interest.

The narrow-tailoring analysis in particular turns on which interest is at stake. An order narrowly tailored to protect the personal safety of identified individuals may look nothing like an order narrowly tailored to protect the government's institutional interest in the credibility of its confidentiality assurances to foreign nationals. The latter interest, for example, might be served by measures short of a blanket prohibition on identifying Respondents—such as redacting specific operational details while permitting identification by name—or might not support the restraint at all if Respondents' circumstances are sufficiently distinguishable from genuine intelligence cooperation. The Masts proposed less restrictive alternatives below, including limiting the restriction to communications with a reasonable likelihood of reaching the Taliban and a carve-out for communications necessary to prepare their defense; the panel rejected those alternatives in the first instance, without the benefit of the district court's evaluation of them against the new rationale.

This Court has long recognized that appellate courts are "not generally equipped to resolve factual issues in the first instance." *Pullman-Standard* v. *Swint*, 456 U.S. 273, 291–92 (1982). "When [this Court] reverse[s] on a threshold question, [it] typically remand[s] for resolution of any claims the lower courts' error prevented them from addressing." *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012). That is precisely the course the Fourth Circuit has followed in analogous circumstances—declining to resolve fact-intensive alternative grounds for affirmance that the district court never addressed. *See Long* v. *Bondi*, 151 F.4th 503, 519 (CA4 2025); *Tederick* v. *LoanCare, LLC*, 168 F.4th 154, 173 (CA4 2026). The panel offered no explanation for departing from that practice here, in a case where the consequence of doing so was to resolve, without adversarial testing, every element of strict scrutiny—including whether the interest exists on these facts, whether the order is narrowly tailored to it, and whether less restrictive means exist—against the party bearing none of the burden.

C. The Question Is Exceptionally Important and Recurring.

The question presented warrants review for several independent reasons.

First, this case involves a content-based prior restraint on core First Amendment speech—"the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n*, 427 U.S. at 559. When a prior restraint is sustained on appeal, the stakes for constitutional liberty are at their highest, and the procedural safeguards that ordinarily attend strict scrutiny—including the requirement that the government, not the court, establish and defend its own compelling interest—matter most.

Second, the panel's approach threatens to hollow out strict scrutiny generally. If a court of appeals may supply a compelling interest that no party advanced and then resolve narrow tailoring and least-restrictive-means without remand, the burden that strict scrutiny places on the government, or on the party defending a restriction, becomes illusory. The government's obligation to "genuine[ly]" articulate its own interest, *Agudath Israel*, 983 F.3d at 633, means little if a reviewing court can invent that interest for it, on facts the government never had reason to develop and law the opposing party never had reason to brief.

Third, the decision extends the national-security exception to prior-restraint doctrine well beyond its established bounds. The panel's cited authorities—*Zubaydah*, *Sims*, *Haig*, *Snepp*, *Edgar*, and *Smith*—all involved the United States government itself as a party invoking, evidencing, and defending its own national-security interest, subject to adversarial testing of its claims. None of that occurred here. This is state tort case arising from a private custody dispute. While the Federal Government has been involved at various stages of the litigation given the unique history of the case, the United States did not seek the speech restrictions at issue. The panel nevertheless extrapolated from cases where the government affirmatively asserted and proved its own interest to a case where it did neither. Extending those precedents to private litigation, on the government's behalf but without its participation, is a significant and unexamined expansion of the national-security exception. If that is to be the law, then this Court should carefully weigh the matter and give its considered view.

Fourth, the decision's practical reach extends well beyond this case. If sustained, it establishes that any litigant whose presence in the United States coincided with a military operation may invoke the government's intelligence-recruitment interest to justify a prior restraint on an opposing litigant's speech—without the government's participation, evidence, or endorsement. That principle could reach thousands of individuals evacuated under Operation Allies Refuge and comparable programs, and the litigants opposing them, who would be bound by restraints on their speech justified by an interest the government itself has never asserted or proven. The implications for First Amendment rights in cases touching on military operations are substantial, and they warrant this Court's review now, before the Fourth Circuit's approach becomes further entrenched.

III. Alternatively, the Court Should Grant Certiorari, Vacate the Decision Below, and Remand for Further Consideration in Light of *Margolin*, Which Reversed the Fourth Circuit (After the Panel Decision Below) for Violating the Party Presentation Principle.

The Court should also strongly consider issuing a GVR order in light of *Margolin*—which this Court handed down after the decision below, including the denial of rehearing. "This Court often 'GVRs' a case—that is, grants the petition for a writ of certiorari, vacates the decision below, and remands for reconsideration by the lower court—when [it] believe[s] that the lower court should give further thought to its decision in light of an opinion of this Court that (1) came after the decision under review and (2) changed or clarified the governing legal principles in a way that could possibly alter the decision of the lower court." *Flowers* v. *Mississippi*, 136 S. Ct. 2157, 2157 (2016) (Alito, J., dissenting from the decision to grant, vacate, and remand).

The grounds for a GVR in light of *Margolin* here are straightforward. The decision in *Margolin* plainly post-dates the decision below, and it involves the principal of party presentation which is squarely at issue here. It is merely icing on the cake that *Margolin* involved a decision from the Fourth Circuit, which has had a number of recent party-presentation issues. The Court in *Margolin* unambiguously clarified the governing legal principle of the party-presentation rule, and it is understatement to say that a GVR could possibly alter the decision of the lower court.

Indeed, if the Court were to GVR and the Fourth Circuit were ultimately to reach the same decision, that would not make the GVR in vain. To the contrary, Petitioners at a minimum would have had an opportunity to respond to the Fourth Circuit's novel national-security rationale and to subject it to adversarial testing. While there is still a possibility that Petitioners would seek further review in this Court, they would not be back seeking review on *that* issue. The GVR would therefore have the effect of narrowing and sharpening the potential issues for this Court's review. And of course, there is also a prospect that the Fourth Circuit will reach a different decision—such as remanding to the district court to apply strict scrutiny in the first instance, as this Court has often advised—that would obviate the need for this Court's review altogether. At least for now.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 18, 2026

APPENDIX

TABLE OF APPENDICES

Appendix A

Filed: April 22, 2026

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 24-1900

(3:22-cv-00049-RSB-JCH)

BABY DOE, A citizen of Afghanistan currently residing in North Carolina, by and through Next Friends, John and Jane Doe; JOHN DOE, citizen of Afghanistan and legal guardian of Baby Doe; JANE DOE, citizen of Afghanistan and legal guardian of Baby Doe,

Plaintiffs-Appellees,

v.

JOSHUA MAST; STEPHANIE MAST; RICHARD MAST,

Defendants-Appellants,

and

KIMBERLEY MOTLEY; AHMAD OSMANI; UNITED STATES SECRETARY OF STATE MARCO RUBIO, Nominal Defendant; UNITED STATES SECRETARY OF DEFENSE PETE HEGSETH, Nominal Defendant,

Defendants.

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ NWAMAKA ANOWI, CLERK

Appendix B

Filed: April 22, 2026

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-1900

(3:22-cv-00049-RSB-JCH)

BABY DOE, A citizen of Afghanistan currently residing in North Carolina, by and through Next Friends, John and Jane Doe; JOHN DOE, citizen of Afghanistan and legal guardian of Baby Doe; JANE DOE, citizen of Afghanistan and legal guardian of Baby Doe,

Plaintiffs-Appellees,

v.

JOSHUA MAST; STEPHANIE MAST; RICHARD MAST,

Defendants-Appellants,

and

KIMBERLEY MOTLEY; AHMAD OSMANI; UNITED STATES SECRETARY OF STATE MARCO RUBIO, Nominal Defendant; UNITED STATES SECRETARY OF DEFENSE PETE HEGSETH, Nominal Defendant,

Defendants.

Appeal from the United States District Court for the Western District of Virginia, at Charlottesville. Norman K. Moon, Senior District Judge. (3 :22-cv-00049-RSB-JCH)

Argued: September 10, 2025
Decided: April 22, 2026

Before DIAZ, Chief Judge, and KING and RICHARDSON, Circuit Judges.

Affirmed by published opinion. Judge Richardson wrote the majority opinion, in which Chief Judge Diaz joined. Judge King wrote a dissenting opinion.

ARGUED: John S. Moran, MCGUIREWOODS, LLP, Washington, D.C., for Appellants. Kevin S. Elliker, HUNTON ANDREWS KURTH LLP, Richmond, Virginia, for Appellees. **ON BRIEF**: David Eliezer Yerushalmi, AMERICAN FREEDOM LAW CENTER, Washington, D.C., for Appellants. Maya M. Eckstein, Lewis F. Powell III, HUNTON ANDREWS KURTH LLP, Richmond, Virginia; Brittany M.J. Record, Ehson Kashfipour, Washington, D.C., Blair Connelly, Zachary Rowen, LATHAM & WATKINS LLP, New York, New York, for Appellees.

RICHARDSON, Circuit Judge:

To protect Plaintiffs and their family members living in Afghanistan, the district court issued a protective order that prohibited Defendants and their lawyers from "disclosing any information that directly or indirectly identifies Plaintiffs or their family members to any person ... unless that person first executes a non-disclosure agreement." J.A. 51-52. Plaintiffs contend that disclosing their identities-or the details surrounding their evacuation from Afghanistan-would endanger both them and their family members in Afghanistan. On the other hand, Defendants argue that the protective order is an unconstitutional prior restraint on their speech because it limits their ability to communicate information that they obtained prior to—and independent of—discovery.

Although the order constitutes a content-based prior restraint, it fits into one of the narrow exceptions in which prior restraints can be permissible, subject to strict scrutiny. And the order satisfies strict scrutiny: It is narrowly tailored to safeguard the government's compelling interest in ensuring our Nation's security, which often depends on ensuring the safety of foreign nationals who ally themselves with United States military and diplomatic efforts abroad. Indeed, if such foreign nationals cannot rely on the United States' assurances of their protection, our Nation's ability to cultivate essential human assets abroad would be seriously undermined. In this case, the narrow protective order is the least restrictive means to safeguard this interest. Therefore, we affirm the district court's protective order.

I. BACKGROUND

In September 2019, an Afghan infant (Baby Doe) was injured and orphaned during a joint U.S.-Afghan military operation in Afghanistan. U.S. Army Rangers then took Baby Doe to a U.S. military hospital for emergency care. Soon thereafter, Major Joshua Mast, who was serving in Afghanistan as a Marine Corps Judge Advocate, learned about Baby Doe. Mast and his wife, Stephanie Mast, began custody proceedings in Virginia. They obtained an interlocutory adoption order in November 2019, which was finalized in December 2020.

Notwithstanding the adoption order, in February 2020, the U.S. Embassy gave custody over Baby Doe to John Doe's father, who claimed to be the child's paternal uncle. From that point forward, Baby Doe was cared for by John and Jane Doe.[1] Through the efforts of U.S. military personnel, John, Jane, and Baby Doe evacuated Afghanistan in August 2021. This evacuation occurred amid the chaotic U.S. withdrawal from Afghanistan, where thousands of individuals were relocated under Operation Allies Refuge. The Does were taken to refugee housing at Fort Pickett, a U.S. military base in Blackstone, Virginia. In September 2021, the Masts took custody of Baby Doe.

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[1] That is, Baby Doe's cousin and his wife.

In March 2022, the Does challenged in Virginia state court the Masts' adoption of Baby Doe. The Supreme Court of Virginia recently rejected the Does' challenge. *See Mast* v. *A.A.,* 925 S.E.2d 665 (Va. 2026).[2]

In September 2022, the Does brought this federal suit against the Masts, Joshua's brother Richard, and others who assisted the Masts. Along with their original complaint, the Does moved for a protective order that would prohibit Defendants from publicly disclosing the Does' identities. In support, John Doe submitted a sealed declaration explaining that he and Jane Doe would fear for their own safety—and that of their family in Afghanistan—if their presence in the United States or the circumstances surrounding their departure from Afghanistan were revealed. He expressed concern that if their location were revealed, then the Taliban would learn of it and harm their family members based on the false perception that Doe was a U.S. cooperator or spy. This fear is even more acute because the Does came to the United States during the evacuation of Afghanistan—at the same time as many genuine cooperators. He further explained that their family would be put at risk even if only their hometowns were publicly disclosed.

In September 2022, the district court granted *ex parte* the Does' motion for a protective order. In

[2] We leave it to the district court to address how, if at all, the Supreme Court of Virginia's ruling affects this ongoing litigation, including the Does' ability to assert third-party standing on behalf of Baby Doe.

doing so, it applied this Court's framework from *James v. Jacobson,* under which a trial court may permit a party to litigate under a pseudonym when privacy considerations outweigh the right of public access and the risk of unfairness to the opposing party. 6 F.3d 233,238 (4th Cir. 1993). The court concluded that the Does had "established grounds to proceed by pseudonym and for the entry of ... a protective order." J.A. 50-51 (citing *James,* 6 F.3d 233 at 238 and *United States v. Doe,* 962 F.3d 139, 147 (4th Cir. 2020)). In particular, the court determined "that disclosure of Plaintiffs' identities and identifying information would pose a substantial risk to the physical safety of Plaintiffs and other innocent third-parties." J.A. 51. The court thus ordered:

> The Defendants and their counsel and representatives are prohibited from disclosing any information that directly or indirectly identifies Plaintiffs and their family members to any person, including but not limited to the Plaintiffs' names and the locations of their residences abroad and places of birth, unless that person first executes a non-disclosure agreement enforceable through the contempt sanction. This applies to any disclosure in the course of any investigation undertaken by the Defendants, their counsel, or their other agents or representatives.

J.A. 51-52. The Masts did not challenge the protective order at the time.

Despite their professed desire to remain anonymous, the Does engaged with the media about their case against the Masts, personally naming the Masts and publicizing their side of the story.[3] That spurred the Masts to file a series of motions to vacate or modify the September 2022 protective order, claiming the Does' actions undermined their claimed justifications for anonymity. The Masts argued that even if the Does are allowed to proceed under pseudonyms, the district court should rescind any restrictions on the Masts' ability to discuss the Does' identities outside the courtroom because such restrictions constitute content-based prior restraints that do not survive strict scrutiny and therefore violate the First Amendment.

On August 16, 2024, the district court denied these motions and held Joshua Mast in civil contempt for sharing photos of Baby Doe with a non-profit foundation that was helping the Masts raise money for litigation. On September 16, 2024, Joshua, Stephanie, and Richard Mast filed a notice of appeal.

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[3] In an article published by The Associated Press in October 2022, the Does and their lawyers provided their account. *See* Juliet Linderman et al., *Afghan couple accuse US Marine of abducting their baby,* Associated Press (Oct. 20, 2022). And in November 2022, the New York Times Magazine ran an article doing the same. *See* Rozina Ali, *How Did This Man Think He Had the Right to Adopt This Baby?,* N.Y. Times (Nov. 20, 2022). In each instance, the Does apparently received agreement from the press that their identities would not be disclosed.

II. DISCUSSION

A. Appellate Jurisdiction Exists

Before reaching the merits, we must assure ourselves of our own appellate jurisdiction. *See, e.g., Mitchell v. Maurer,* 293 U.S. 237,244 (1934) ("An appellate federal court must satisfy itself ... of its own jurisdiction."); *see also LeClair v. Tavenner,* 128 F.4th 257, 261 (4th Cir. 2025). Here, this requirement means that we must address two issues: (1) whether the notice of appeal was timely filed, and (2) whether the district court's August 16, 2024 order is immediately appealable. *See Bowles v. Russell,* 551 U.S. 205, 214 (2007) ("[T]he timely filing of a notice of appeal in a civil case is a jurisdictional requirement.").

1. Timeliness of appeal

In a civil case, a notice of appeal must be filed within thirty days of the entry of the order being appealed. Fed. R. App. P. 4(a). The Masts didn't appeal the September 2022 order.

On August 16, 2024, the district court entered an order holding Joshua Mast in contempt for violating the September 2022 protective order and denying the Masts' motion to vacate or modify that protective order. The Masts timely appealed the district court's August 16, 2024 order refusing to modify the earlier protective order.[4]

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[4] They timely filed their notice of appeal on September 16, 2024. Because the thirty-day deadline fell on a Sunday, the

Of course, the August 2024 order did not restart the clock for a timely appeal of the September 2022 order. *See FTC v. Minneapolis-Honeywell Regul. Co.,* 344 U.S. 206, 212 (1952); *cf. FTC v. Simple Health Plans LLC,* 58 F.4th 1322, 1330 (11th Cir. 2023). So the Masts may not challenge the initial protective order in this appeal. But that is not what they are doing.[5]

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filing period was extended to the next business day under Fed. R. App. P. 26(a).

[5] Some courts have suggested that a motion to modify an injunction cannot be used as a loophole to successively challenge the issuance of an injunction. *See, e.g., Tyler v. Murphy,* 135 F.3d 594,595 (8th Cir. 1998) ("Absent abuse, such as the filing of successive unsuccessful motions, the order denying a motion to dissolve an injunction is appealable."); *SEC v. Suter,* 832 F .2d 988, 990 (7th Cir. 1987) (suggesting that an order denying a motion to vacate an injunction is appealable unless "the *only purpose* of the motion was to take a belated appeal" (emphasis added)); *SEC v. Young,* 121 F.4th 70, 78 (10th Cir. 2024) ("When a district court has denied a *successive* motion to modify a preliminary injunction-a motion that raises the same issues or raises issues that could have been raised in a prior motion-we exercise interlocutory jurisdiction only if there was a change in circumstances, evidence, or law since the prior motion." (emphasis added)). Given the case developments since September 2022, there is no reasonable suggestion that the Masts' motion to modify was an abuse of process. So we need not determine whether or when the denial of a motion to modify an injunction made in this Circuit is not appealable despite the language of § 1292(a)(l).

2. The order is appealable under § 1292(a)(l)

Because the appeal of the August 16, 2024 order was timely, we must determine whether that interlocutory order is immediately appealable. This Court has jurisdiction over interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions, *or refusing to dissolve or modify* injunctions." 28 U.S.C. § 1292(a)(l) (emphasis added); *Pickle v. Char Lee Seafood, Inc.,* 174 F.3d 444,448 (4th Cir. 1999) ("It is ... well established that an order denying a request to modify an injunction is subject to interlocutory appeal under 28 U.S.C. § 1292(a)(l)."). The district court's August 2024 order expressly denied the Masts' motion to vacate or modify the protective order. So it seems to fall within § 1292(a)(l) so long as the underlying September 2022 protective order is an "injunction." It is.

An order need not be formally labeled an "injunction" to be appealable under this section. Instead, we must look to the order's "practical effect." *Abbott v. Perez,* 585 U.S. 579, 594 (2018) ("[W]here an order has the 'practical effect' of granting or denying an injunction, it should be treated as such for purposes of appellate jurisdiction."); *Selective Ins. Co. of America v. Westfield Ins. Co.,* 73 F.4th 239, 243 (4th Cir. 2023).[6]

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[6] *See also Injunction,* Black's Law Dictionary (12th ed. 2024) ("A court order commanding or preventing an action."); 1 Howard C. Joyce, *A Treatise on the Law Relating to Injunctions* § 1, at 2-3 (1909) ("In a general sense, every order of a court which commands or forbids is an injunction; but in its accepted

At the same time, we have made it clear that because "[m]ost court orders are injunctions at some level of generality, ... Congress did not envision that every interlocutory order restraining a party's actions could be appealable under § 1292(a)(l)." *United States ex rel. Lutz v. United States,* 853 F.3d 131, 139 (4th Cir. 2017). To this end, we have articulated a two-pronged inquiry for resolving the practical-effects test: An order is appealable under § 1292(a)(l) if the order "(1) may have a serious, perhaps irreparable consequence and (2) can only be effectually challenged through immediate appeal, rather than upon final judgment." *Selective Ins.,* 73 F.4th at 243 (internal quotation marks omitted); *see also Carson v. Am. Brands, Inc.,* 450 U.S. 79, 84 (1981); *In re Braxton,* 258 F.3d 250,257 (4th Cir. 2001).

This appeal satisfies both prongs. First, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976) (plurality opinion); *see also CBS, Inc. v. Davis,* 510 U.S. 1315, 1318 (1994) ("[I]ndefinite delay of [asserted speech rights] will cause irreparable harm ... that is intolerable under the

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legal sense, an injunction is a judicial process or mandate operating *in personam* by which ... a party is required to do or refrain from doing a particular thing. An injunction has also been defined as a writ framed according to the circumstances of the case, commanding an act which the court regards as essential to justice, or restraining an act which it esteems contrary to equity and good conscience.").

First Amendment."); *Johnson v. Bergland,* 586 F.2d 993, 995 (4th Cir. 1978) ("Violations of first amendment rights constitute per se irreparable injury."); *In re Murphy-Brown, LLC,* 907 F.3d 788, 796 (4th Cir. 2018) (same). Here, the Masts claim a First Amendment right to speak about the Does' identities *now.* Thus—second—forcing the Masts to wait until final judgment would deny that right entirely, because any subsequent appeal could not retroactively restore the speech that was restrained during litigation. So the Masts have alleged an irreparable harm that can only be effectually challenged through immediate appeal. *See Roman Catholic Diocese of Brooklyn v. Cuomo,* 592 U.S. 14, 19 (2020) (per curiam). The order therefore has the practical effect of an injunction, and we have jurisdiction under § 1292(a)(l).[7]

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[7] Two of our sister circuits agree. *See Parker v. Columbia Broad Sys., Inc.,* 320 F.2d 937, 938 (2d Cir. 1963) (holding that an order restricting parties' out-of-court speech was "in the nature of a preliminary injunction, and therefore appealable under 28 U.S.C. § 1292(a)(l)"); *Bailey v. Sys. Innovation, Inc.,* 852 F.2d 93, 96-97 (3d Cir. 1988) (same).

The dissent mistakenly relies on *Gulfstream Aerospace Corp. v. Mayacamas Corp.,* 485 U.S. 2 71 (1988). *Gulfstream* concerned a stay order that merely governed the sequence of proceedings between two courts, a classic case-management order. The Court's observation that an order "relat[ing] *only to the conduct or progress of litigation* before that court ordinarily is not considered an injunction," *id.* at 279 (emphasis added), applies to orders whose effect is confined to the litigation itself: discovery schedules, consolidation orders, and the like. The 2022 Protective Order is categorically different. It reaches well beyond this courtroom, prohibiting the Masts from disclosing

B. The Protective Order Survives First Amendment Scrutiny

We turn now to the merits of the Masts' claim that in light of changed circumstances, the continued enforcement of the protective order violates the First Amendment as a content-based prior restraint.[8] While we agree with the Masts that the protective order constitutes a content-based prior restraint, we nonetheless hold that the order does not violate the First Amendment. The record supports the conclusion that the speech enjoined would undermine the government's compelling national security interests. *See Near v. Minnesota ex rel. Olson,* 283 U.S. 697, 716 (1931). And it satisfies strict scrutiny, because it was narrowly tailored to-and the least restrictive means of protecting-the government's compelling interest in ensuring the Nation's security. *See Reed v. Town of Gilbert,* 576 U.S. 155, 163 (2015); *Reno v. ACLU,* 521 U.S. 844, 874 (1997).

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information about the Does *to any person,* in *any forum.* An order that restricts a party's out-of-court speech about facts known independently of litigation is not a routine case-management order relating only to the "conduct or progress of litigation"; it is an injunction.

[8] We review the denial of a motion to vacate an injunction for abuse of discretion, *see Sys. Fed'n No. 91, Ry. Emp. Dep't, AFL-CIO v. Wright,* 364 U.S. 642, 650 (1961); *Shingara v. Skiles,* 420 F.3d 301, 305 (3d Cir. 2005), while reviewing legal conclusions *de novo. Grimmett v. Freeman,* 59 F.4th 689, 692 (4th Cir. 2023).

1. The protective order is a content-based prior restraint

"Content-based restrictions target 'particular speech because of the topic discussed or the idea or message expressed.'" *Murphy-Brown,* 907 F.3d at 797 (quoting *Reed,* 576 U.S. at 163). Distinctions drawn "based on the message a speaker conveys," whether they regulate speech "by particular subject matter" or "by its function or purpose," are facially content based and presumptively unconstitutional. *Reed,* 576 U.S. at 163-64.

In *Murphy-Brown,* this Court held that an order prohibiting "any extrajudicial statement ... to any person or persons associated with any public communications media ... *relating to the trial, the parties or issues in th[e] case* which could interfere with a fair trial or prejudice any plaintiff, the defendant, or the administration of justice" constituted a content-based restriction. 907 F.3d at 792-93, 796-97 (emphasis added). True, that case involved a broad gag order. But in a similar way, the protective order at issue here is a content-based restriction on speech, because it facially singles out and restricts the Masts' ability to speak extrajudicially "to any person" if their message functions to "directly or indirectly" reveal the Does' or their family members' identities. J.A. 51-52.

As the order prohibits speech before it is expressed, it is also a prior restraint.[9] "The term

[9] *See also Murphy-Brown,* 907 F.3d at 796-97 (concluding that court order prohibiting the parties, their lawyers, and all

prior restraint is used 'to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.'" *Alexander v. United States,* 509 U.S. 544, 550 (1993) (quoting M. Nimmer, *Nimmer on Freedom of Speech* § 4.03, p. 4-14 (1984)) (emphasis in *Alexander).* "[C]ourt orders that actually forbid speech activities are classic examples of prior restraints." *Alexander,* 509 U.S. at 550 (cleaned up).

Importantly, the order does not merely restrict the dissemination of information obtained through court-sanctioned discovery; it prevents the Masts from sharing information learned *independently* of this litigation. That distinction matters. In *Seattle Times Co. v. Rhinehart,* the Supreme Court held that an order limiting dissemination of information gained through discovery "is not the kind of classic prior restraint that requires exacting First Amendment scrutiny," because the restricted party

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potential witnesses from speaking to the media about the trial, parties, or issues is a prior restraint); *Matter of Subpoena 2018R00776,* 947 F.3d 148, 155-59 (3d Cir. 2020) (finding that nondisclosure orders were prior restraints); *In re Dan Farr Productions,* 874 F.3d 590, 592-93 (9th Cir. 2017) (finding that protective order prohibiting the defendants from making public statements on certain topics relevant to the merits of the case was a prior restraint). Even though the threatened sanction is not imposed until after the speech has occurred, practically, the protective order operates as an immediate restraint on the Masts' speech. *See* David S. Ardia, *Freedom of Speech, Defamation, and Injunctions,* 55 Wm. & Mary L. Rev. 1, 37-38 (2013).

would never have possessed that information if not for the court's coercion-backed processes. 467 U.S. 20, 33 (1984); *see also* Eugene Volokh, *The Law of Pseudonymous Litigation,* 73 Hastings L.J. 1353, 13 7 6 (2022) (explaining that "[w]hen a party learns information through discovery—essentially invoking the coercive power of the court—a court may impose a protective order limiting the publication of this information" so long as *Seattle Times*'s deferential "good cause" standard is satisfied). But "injunctions against parties revealing information that they already knew before filing the case" *are* classic prior restraints. *Id.* Here, the Masts knew the Does' true identities before this lawsuit was filed, so this knowledge was not "gained through the pretrial discovery process." *See Seattle Times,* 467 U.S. at 22. Indeed, the Masts' knowledge of the Does' identities was obtained independently, through the parties' pre-litigation interactions that gave rise to this suit. The order is not, therefore, a restriction on information that the court coercively compelled the Does to produce. So *Seattle Times*'s more deferential "good cause" standard does not apply.

The district court's attempt to distinguish the order from a prior restraint by characterizing it as a necessary "corollary" to enforce the pseudonym order conflates two distinct inquiries, each designed to protect different rights. J.A. 314. After the district court found that the Does' privacy interests were sufficiently compelling to warrant anonymity under

James's balancing test,[10] it concluded that the same test justified the means necessary to make anonymity effective: preventing the Masts (and third parties) from speaking on a particular topic. But the *James* test balances a plaintiff's privacy interests against the public's right of access to judicial proceedings and a defendant's right to fair process. *See James,* 6 F.3d at 238-39; *Doe v. Sidar,* 93 F.4th 241 , 246-47 (4th Cir. 2024). It is not—and was never intended to be—a test for justifying a prior restraint on a party's distinct First Amendment right to free speech outside the courthouse. In other words, the *James* test determines whether a plaintiff can shield their identity *in the litigation;* it does not grant the court license to censor the defendant's right to speak about that identity in the public sphere. Therefore, the district court erred in relying on *James. James*'s balancing test cannot justify an order restricting the Masts' ability to speak about information they knew prior to, and independent of, coercion-backed discovery. So to invoke *James* here as a substitute for a proper prior restraint analysis would create an end-run around the First Amendment: Once a plaintiff's privacy interest is deemed sufficient to justify anonymity, the defendant's core speech rights would automatically be extinguished without any further analysis. The correct approach is to treat the two inquiries separately. Once the court determined that pseudonymity was warranted under *James,* it

[10] *See James,* 6 F.3d at 238-39.

must separately consider whether a prior restraint order is permissible.

Judicial prior restraints on speech are permitted only in "exceptional cases." *Near v. Minnesota,* 283 U.S. 697, 716 (1931). These exceptional circumstances are limited to speech that, for example, threatens national security, is obscene, or incites violence. *Id.*; *S.E. Promotions, Ltd. v. Conrad,* 420 U.S. 546, 558-59 (1975) ("In order to be held lawful, [a prior restraint], first, must fit within one of the narrowly defined exceptions to the prohibition against prior restraints."); *see also Times Film Corp. v. City of Chicago,* 365 U.S. 43, 47-49 (1961).[11]

Even if the speech falls within one of the narrowly defined exceptions, a prior restraint of it still carries "a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 70 (1963); *see also Stuart,* 427 U.S. at 559 (explaining that a judicially imposed prior restraint is "the most serious and the least tolerable infringement on First Amendment rights" because it is backed by an official threat of

[11] The unique role of the court illustrates one other circumstance that may justify a prior restraint: A court has responsibility to ensure a criminal defendant receives a fair trial and corresponding power to control courtroom proceedings, including, at times, restricting the speech of parties, their counsel, and courtroom officials. *Neb. Press Ass 'n v. Stuart,* 427 U.S. 539, 555, 564 (1976); *Sheppard v. Maxwell,* 384 U.S. 333, 358, 361-62 (1966). But the party seeking such a restraint "carries a heavy burden of showing justification." *NY. Times Co. v. United States,* 403 U.S. 713, 714 (1971) (per curiam) (quotation omitted).

"immediate and irreversible sanction" and therefore not only "chills" speech but "freezes" it altogether (citing Alexander Bickel, *The Morality of Consent* 61 (1975) ("A criminal statute chills; prior restraint freezes"))); *cf* 4 W. Blackstone, Commentaries on the Laws of England *151-52 (London, 1765-69) (describing the difference between criminal sanctions and prior restraints). For that reason, our Court subjects content-based prior restraints to strict scrutiny. *See Murphy-Brown,* 907 F .3d at 796-97. So, the district court's order in this case may be upheld only if it is narrowly tailored to-and the least restrictive means of achieving-a compelling government interest that is jeopardized by the restricted speech. *See Stuart,* 427 U.S. at 562. We hold that the order satisfies this demanding test.

2. Compelling interest

"It is obvious and unarguable that no governmental interest is more compelling than the security of the Nation," and that "measures to protect the secrecy of our Government's foreign intelligence operations plainly serve these interests." *Haig v. Agee,* 453 U.S. 280, 307 (1981) (cleaned up); *see also Edgar v. Haines,* 2 F.4th 298, 304 (4th Cir. 2021). "The Government has a compelling interest in protecting" not only "the secrecy of information important to our national security" but also "the *appearance* of confidentiality so essential to the effective operation of our foreign intelligence service." *Snepp v. United States,* 444 U.S. 507, 509 n.3 (1980) (per curiam) (emphasis added). That includes protecting the identity of potential foreign collaborators. Even the appearance of secrecy is critical for "protecting sensitive sources and methods of gathering information." *United States v. Smith,* 780 F.2d 1102, 1108 (4th Cir. 1985). As the Supreme Court explained in *CIA v. Sims*:

> If potentially valuable intelligence sources come to think that the [government] will be unable to maintain the confidentiality of its relationship to them, many could well refuse to supply information ... in the first place. Even a small chance that some court will order disclosure of a source's identity could well impair intelligence gathering and cause sources to "close up like a clam." To induce some sources to cooperate, the Government must tender as absolute an assurance of confidentiality as it possibly can. . . . We seriously doubt whether a potential intelligence source will rest assured knowing that judges, who have little or no background in the delicate business of intelligence gathering, will order his identity revealed.

471 U.S. 159, 175-76 (1985); *cf United States v. Zubaydah,* 595 U.S. 195, 207-09 (2022) (explaining that to either confirm or deny the government's confidential relationship with "Country A[] can diminish the extent to which the intelligence services of Countries A, B, C, D, etc., will prove willing to cooperate with our own intelligence services in the future"). Thus, the government's ability to provide credible assurances to potential collaborators that they and their family members

will not be endangered by aiding the United States is directly tied to its compelling interest in ensuring the Nation's security.

This interest necessarily encompasses protecting the confidentiality of those who are *perceived* as collaborators, regardless of whether they are actual collaborators. That's because the government's ability to credibly ensure the confidentiality of collaborators, and thus its ability to recruit and retain them,[12] depends in part on avoiding publicly marking those seen as having assisted the U.S. government. This Nation's adversaries often target suspected collaborators-not just confirmed ones-to create widespread fear and deter assisting the United States. *Cf.* Ben Brandt, *The Taliban's Conduct of Intelligence and Counterintelligence,* 4(6) Combating Terrorism Center Sentinel 19 (June 2011); European Asylum Support Office, *Afghanistan Security Situation Update: Country of Origin Information Report* at 16 (Sept. 2021). If the government only protects the secrecy of information of *actual* collaborators, the Nation's adversaries would be capable of effectively deterring potential collaborators and thereby undermining the government's ability to gather the intelligence necessary to protect the United States' foreign policy

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[12] As the Supreme Court explained in *Snepp,* "[t]he continued availability of . . . foreign sources depends upon the [government's] ability to guarantee the security of information that might compromise them and even endanger the personal safety of foreign agents" operating abroad. 444 U.S. at 512.

and security interests.[13] And to preserve the appearance of confidentiality and thereby retain the trust of *actual* collaborators, the government's interests necessarily encompass protecting those publicly perceived as—and targeted for—having assisted the United States.

The district court concluded that the disclosure of the Does' identities would pose a grave and imminent risk of retaliation against perceived collaborators abroad, undermining the government's compelling interest in safeguarding the Nation's security. We find the record supports that conclusion. As the district court noted, the Does were evacuated from Afghanistan to the United States in late August 2021 and then housed at United States military bases. During this time, Operation Allies Refuge—as the name suggests—sought to support Afghans who worked alongside the United States in Afghanistan by bringing them to the United States. The circumstances and timing of the Does' evacuation and resettlement would predictably (even if mistakenly) lead an outside observer as well as the Taliban to perceive the Does as American collaborators. Indeed, "evidence readily showed the grave safety risks that . . . [the Does'] families in Afghanistan would face if [the Does'] identities became public." J.A. 315. The Taliban would likely "carry out violence against the Does' families

[13] *See Agee*, 453 U.S. at 307 ("Protection of the foreign policy of the United States is a governmental interest of great importance, since foreign policy and national security considerations cannot neatly be compartmentalized.").

remaining in Afghanistan."[14] *See, e.g.,* J.A. 315-18. Nor is this mere conjecture, as the district court found that the "threat" to their families, if the Does' "identities become known, is *anything but speculative*." J.A. 317 (emphasis added); *see* J.A. 316 (noting that there have already been "several instances in which" known family members "appear[ed] to have been directly targeted by shadowy figures alluding to [the Does]").

When United States military and intelligence agencies conduct foreign operations requiring local assistance, potential collaborators naturally assess the risks. Common sense tells us that establishing the trust necessary to recruit actual collaborators requires the United States to protect those perceived as collaborators. *See Snepp,* 444 U.S. at 509 n.3. That trust is directly threatened when our government allows those who may be perceived as collaborators—like the Does—to be publicly identified. Indeed, identification of the Does' families abroad would expose them to immediate harm and concretely impair the credibility on which sensitive cooperation depends. Without the protective order, the Masts' ability to freely disclose the Does' identities would impair the government's

[14] This risk of retaliation by the Taliban is especially predictable given that "more than 40% of Afghans . . . took significant risks to support [the U.S.] military and civilian personnel in Afghanistan, working for or on behalf of the U.S. government in Afghanistan or [its] coalition forces, or are a family member of someone who did." U.S. Dep't of Homeland Security, *Operation Allies Welcome* (Jan. 22, 2025).

capacity to recruit and retain cooperating informants, which, in tum, would weaken the United States' foreign policy and national security.[15]

3. Narrow tailoring

The protective order's service of a compelling government interest is not alone enough. The order must also be narrowly tailored to that interest and the least restrictive means of achieving it. *See Murphy-Brown,* 907 F .3d at 799. Strict scrutiny does not require a restriction to be "perfectly tailored." *Williams-Yulee v. Florida Bar,* 575 U.S. 433, 454 (2015); *Abbott v. Pastides,* 900 F.3d 160, 174 n.7 (4th Cir. 2018). Nevertheless, court-ordered prior restraints "should be a last resort, not a first impulse." *Murphy-Brown,* 907 F.3d at 800.

This protective order—prohibiting "disclosing any information that directly or indirectly identifies Plaintiffs and their family members to any person . . . unless that person first executes a non-disclosure agreement"—is sufficiently narrowly tailored. It is limited to the Masts as participants in the litigation. *Cf Stuart,* 427 U.S. at 563. It limits the Masts from disclosing only the Does' identities and information

[15] While the district court framed the relevant compelling interest as the personal safety of the Does and their family members in Afghanistan, its undisputed factual findings also implicate the government's compelling interest in national security. These findings establish that disclosure of the Does' identities would undermine the government's ability to protect intelligence sources and maintain credibility necessary for future recruitment.

that would reasonably enable someone to determine their identities. And that limitation can be ameliorated by using a non-disclosure agreement.

The district court's protective order does not purport to control the Masts' ability to speak generally about the litigation, about the Does' claims, or about their own defenses. This fact sets the protective order apart from gag orders struck down in cases like *MurphyBrown,* which prohibited the parties and their lawyers, as well as "all potential witnesses," from:

> giv[ing] or authoriz[ing] any extrajudicial statement or interview to any person or persons associated with any public communications media or that a reasonable person would expect to be communicated to a public communications media relating to the trial, the parties[,] or issues in this case which could interfere with a fair trial or prejudice any plaintiff, the defendant, or the administration of justice and which is not a matter of public record. Statements of information intended to influence public opinion regarding the merits of this case are specifically designated as information which could prejudice a party.

907 F.3d at 792-93. Here, unlike the parties in *Murphy-Brown,* the Masts remain free to discuss the case in the court of public opinion by "giv[ing] or authoriz[ing] any extrajudicial statement or interview . . . relating to the trial, the parties[,] or

the issues in this case." *Id.*[16] They simply must not reveal the Does' identities.

Indeed, the Masts have *already* engaged with the media without violating the protective order. After sustaining the protective order's validity, the district court rejected the Does' motion to hold the Masts in civil contempt for giving a televised interview with CBS that even included Baby Doe's photograph. As the court concluded, the Masts did not violate the protective order because the Masts themselves never disclosed the Does' names, did not explain where they found Baby Doe, and did not authorize CBS to show Baby Doe's face.

What's more, the protective order does not issue a categorical prohibition on revealing the Does' identities: So long as they secure a non-disclosure agreement with third parties, the Does' identities can be revealed without violating the order. Finally, we agree with the district court in rejecting the Masts' claim that the protective order will generate a "parade of horribles"—*e.g.*, preventing them from enrolling Baby Doe in school absent teachers and staff signing a non-disclosure agreement. *See* J.A.

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[16] *Cf Gag Order,* Merriam-Webster.com Dictionary ("a judicial ruling barring public disclosure or discussion (as by the press) of information related to a case"); *Gagging Order,* Merriam-Webster.com Dictionary ("an order by a judge or court saying that the people involved in a legal case cannot talk about the case or anything related to it in public"); *Gag Order,* Black's Law Dictionary (12th ed. 2024) ("A judge's order directing parties, attorneys, witnesses, or journalists to refrain from publicly discussing the facts of a case").

326. The order limits only the Masts' identification of the Does *as plaintiffs* in connection with this litigation, and thus cannot be reasonably read to preclude the Masts from telling Baby Doe's teachers, "This is [Baby Doe]."

Nor do we find persuasive the Masts' contention that the district court failed to "consider any less restrictive measures that would permit the Masts to speak about the case and prepare their defense." Appellants' Br. at 36. The Masts suggest, for example, that the court could have limited the order's "speech restrictions to communications that have a reasonable likelihood of reaching the Taliban, such as communications with media outlets as opposed to communications with private individuals, or to provide a carve out for communications that are necessary for the Masts to prepare their defense." *Id.* at 36-37. For one, as explained above, the order *does* allow the Masts to speak with both the media and private individuals about their case, so long as they do not reveal the Does' identities absent a non-disclosure agreement. And even identifying the Does to a private individual carries with it a risk of eventual publication-and discovery by the Taliban. Furthermore, the Masts fail to explain how one could determine whether there is a "reasonable likelihood" that a communication might reach the Taliban. Strict scrutiny requires restrictions to be meaningfully tailored to the compelling interest, not so perfectly tailored as to eliminate all possible alternatives. *See Williams-Yulee,* 575 U.S. at 454. The district court's order satisfies that standard. So the order survives strict scrutiny.

C. The Protective Order Is Not Unconstitutionally Vague

The protective order's speech restrictions still have one more hurdle to clear. The Fifth Amendment's Due Process Clause states that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.,* 567 U.S. 239, 253 (2012). "The government violates this prohibition when it deprives someone of life, liberty, or property pursuant to a . . . regulation that is [I]1 'so vague that it fails to give ordinary people fair notice of the conduct it punishes, or [2] so standardless that it invites arbitrary enforcement.'" *Lumumba v. Kiser,* 116 F .4th 269, 284 (4th Cir. 2024) (quoting *Johnson v. United States,* 576 U.S. 591, 595 (2015)). "When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech." *Fox Television,* 567 U.S. at 253-54; *see also Hoffman Estates v. Flipside, Hoffman Estates, Inc. ,* 455 U.S. 489, 499 (1982) (explaining that where a government directive "interferes with the right of free speech . . . , a more stringent vagueness test should apply").

That said, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *United States v. Williams,* 553 U.S. 285, 304 (2008) (quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 794 (1989)); *see also Recht v. Morrisey,* 32 F .4th 398, 415 (4th Cir. 2022) ("That some smidgen of ambiguity remains is no reason to find a [government action] unconstitutionally vague."). And more ambiguity is tolerated in regulations "with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." *Hoffman Estates,* 455 U.S. at 499. A directive is not unconstitutionally vague as long as it "establishes minimal guidelines to govern" its enforcement and "gives reasonable notice of the proscribed conduct." *Schleifer v. City of Charlottesville,* 159 F.3d 843, 853 (4th Cir. 1998).

We conclude that the order is not unconstitutionally vague. The Masts contend that the protective order's prohibition against "indirectly" identifying the Plaintiffs is fatally imprecise and provides no objective standard for a person of ordinary intelligence to follow. *See* Appellants' Br. at 39-41; *cf Murphy-Brown,* 907 F.3d at 800. But this argument is unavailing in light of our precedent. *See, e.g., Broadrick v. Oklahoma,* 413 U.S. 601, 606-07 (1973) (holding that a state statute prohibiting certain employees from "directly or indirectly" soliciting or receiving, "or in any manner be[ing] concerned in soliciting or receiving" political contributions is not unconstitutionally vague); *United States* v. *Ehsan,* 163 F.3d 855, 859-60 (4th Cir. 1998) (holding that an Executive Order that banned "direct and indirect" exportation to Iran was not unconstitutionally vague); *Dep't of Conservation & Dev.* v. *Tate,* 231 F.2d 615, 616 (4th Cir. 1956) (holding that a court decree providing that lease of a park must not "directly or indirectly" racially discriminate was not unconstitutionally vague); *Patrick* v. *Teays Valley Trs., LLC,* 297 F.R.D. 248, 257 (N.D. W. Va. 2013) (holding that an interrogatory asking for the names of employees who communicated with a party "either directly or indirectly" was not impermissibly vague); *cf Wright* v. *Heizer Corp.,* 560 F.2d 236, 255-56 (7th Cir. 1977) (holding that an order enjoining the defendant from "directly or indirectly" entering into certain transactions met the injunction-specificity requirement of Federal Rule of Civil Procedure 65(d)).

Our holding in *Ehsan* is particularly instructive. There, we explained that an Executive Order prohibiting "direct and indirect" exportation to Iran "does not undermine the simple, unambiguous bar ... of all 'exportation . . . to Iran.'" 163 F.3d at 859-60. Similarly, here, the district court's protective order should be straightforwardly read to prohibit disclosing information that gives away the Does' identities unless the person to whom the Masts make the disclosure signs a non-disclosure agreement. For example, the Masts did *in fact* know that sharing Baby Doe's photo to a third-party violated the order: When asked why he could not share a photo, Joshua Mast said, "[b]ecause I was required to do that by the protective order. I could not identify her to other people." Thus, the order is sufficiently clear to pass constitutional muster.[17]

* * *

Although the order is a content-based prior restraint, this is the exceptional case in which a prior restraint is permissible. The threat to the government's compelling interest in ensuring our Nation's security is not mere conjecture. The government must be able to credibly guarantee the confidentiality of potential foreign intelligence assets and their families. Absent this guarantee, our military and intelligence agencies' ability to cultivate the trust of potential informants would be seriously undermined, which, in tum, would threaten our Nation's security. And the order satisfies strict scrutiny: It was narrowly tailored to safeguarding that interest and was the least restrictive means of doing so. We therefore uphold the district court's protective order.

[17] We also reject the Masts' argument that the order is impermissibly vague because of the alleged uncertainty concerning who qualifies as one of the Does' "family members." *See* Appellants' Br. at 41. First, the district court required the Does to identify "each biological parent and each paternal or maternal sibling, grandparent, aunt, or uncle of John Doe, Jane Doe, or Baby Doe in Afghanistan." *Doe v. Mast,* 2023 WL 8481049, at *3 (W.D. Va. Dec. 7, 2023) (granting the Masts' motion to compel a response to an interrogatory). Second-as the Does point out-if the Masts do not know that someone is related to the Does, it is difficult to imagine how they could possibly step on the "landmine" of identifying that person as a family member of the Does. *See* Appellees' Br. at 60.

AFFIRMED

KING, Circuit Judge, dissenting:

Contrary to my good friends in the panel majority, I am of opinion that we lack appellate jurisdiction over this interlocutory appeal from the Western District of Virginia. Specifically, my assessment is that the district court's 2024 Order (the "2024 Order") denying defendants Joshua Mast, Stephanie Mast, and Richard Mast's motion to modify the court's earlier 2022 Protective Order (the "2022 Protective Order") is not a "refus[al]" by the court "to dissolve or modify [an] injunction," *see* 28 U.S.C. § 1292(a)(l), because the 2022 Protective Order is plainly not an injunction, *see, e.g., Gulfstream Aerospace Corp. v. Mayacamas Corp.,* 485 U.S. 271, 279 (1988) (explaining that court order "relat[ing] only to the conduct or progress of litigation before that court ordinarily is not considered an injunction"). As such, the 2024 Order is simply not an immediately appealable interlocutory order, pursuant to the well-delineated parameters of § 1292(a)(l).

Nor, for that matter, does the district court's 2024 Order qualify for immediate interlocutory review pursuant to the so-called collateral order doctrine. *See, e.g., Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541 (1949) (recognizing, inter alia, that collateral order appeal is only permitted when order would "be effectively unreviewable on appeal from a final judgment"). To be sure, both the 2022 Protective Order and the 2024 Order could be adequately reviewed by our Court in the posture of a § 1291 final decision appeal. *See, e.g., Doe v. Pub.*

Citizen, 749 F.3d 246, 273-75 (4th Cir. 2014) (reversing — after entry of final judgment — federal court party-pseudonymity order); *but see Doe v. Sidar,* 93 F.4th 241 , 245 (4th Cir. 2024) (concluding that non-anonymity orders are immediately appealable under collateral order doctrine); *accord Doe v. Vill. of Deerfield,* 819 F .3d 3 72, 376 (7th Cir. 2016) (exercising collateral order jurisdiction and explaining that "[i]f parties were required to litigate the case through to a final judgment on the merits utilizing their true names, the question of whether anonymity is proper would be rendered moot"). Accordingly, in these circumstances, there is also no sound basis for invoking the collateral order doctrine to authorize interlocutory review of the propriety of the 2024 Order.

* * *

Pursuant to the foregoing, I would readily grant plaintiff John and Jane Doe's motion to dismiss this improvidently-filed interlocutory appeal for lack of appellate jurisdiction. Because the panel majority has concluded otherwise, I respectfully dissent.[*]

[*] If I was of opinion that we possessed appellate jurisdiction in this situation, I might have agreed with the panel majority's assessment that the district court did not at all abuse its discretion. But "[b]ecause I believe we lack [appellate] jurisdiction to do so and my opinion would therefore be purely advisory, I decline to state any conclusive view on the issue." *See Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.,* 95 F.4th 181, 193 n.1 (4th Cir. 2024) (Wynn, J., concurring in judgment in part and dissenting in part).

Appendix C

Filed: May 20, 2026

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-1900

(3:22-cv-00049-RSB-JCH)

BABY DOE, A citizen of Afghanistan currently residing in North Carolina, by and through Next Friends, John and Jane Doe; JOHN DOE, citizen of Afghanistan and legal guardian of Baby Doe; JANE DOE, citizen of Afghanistan and legal guardian of Baby Doe,

Plaintiffs-Appellees,

v.

JOSHUA MAST; STEPHANIE MAST; RICHARD MAST,

Defendants-Appellants,

and

KIMBERLEY MOTLEY; AHMAD OSMANI; UNITED STATES SECRETARY OF STATE MARCO RUBIO, Nominal Defendant; UNITED STATES SECRETARY OF DEFENSE PETE HEGSETH, Nominal Defendant,

Defendants.

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 40 on the petition for rehearing en banc.

Entered at the direction of the panel: Chief Judge Diaz, Judge King, and Judge Richardson.

For the Court

/s/ NWAMAKA ANOWI, CLERK

Appendix D

Filed: August 16, 2024

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA

Nos. 3:22-cv-00049

JOHN DOE, et al.,

Plaintiffs,

v.

JOSHUA MAST, et al.,

Defendants.

MEMORANDUM OPINION & ORDER

Judge Norman K. Moon

Before the Court are a series of motions concerning whether Plaintiffs should be afforded the ability to continue litigating this case using pseudonyms. The Court entered a Protective Order at the outset of this litigation allowing Plaintiffs to use pseudonyms following evidence that their families still living in Afghanistan under Taliban rule would face a serious risk of threat, injury, or death, should Plaintiffs' identities become known. Defendants ask the Court to vacate the Protective Order—arguing that the order is unfair largely because it shields Plaintiffs from public scrutiny, while permitting Defendants to be publicly named. For the reasons set forth below, the Court will deny the motions to vacate the Protective Order. Dkt. 26.

The Court also considers several motions by Plaintiffs seeking to enforce the Protective Order against Defendants Joshua and Stephanie Mast, and asking the Court to find them in civil contempt. The first alleged breach of the Protective Order stems from a television interview the Masts gave, in which they publicly identified Baby Doe from a photograph. The Court finds the disclosure inadvertent at best, and not rising to clear and convincing evidence of a knowing violation of the Protective Order.

The second alleged breach of the Protective Order stems from Joshua and Jonathan Mast's communications with a non-profit to seek funding for the Masts' legal defense in this action. Plaintiffs claim that Joshua Mast knowingly violated the Protective Order by sending photos of Baby Doe to the non-profit, and then seeking to maintain a fictitious distance with the entity by positioning his brother, Jonathan Mast, as the group's point of contact with the family. The non-profit posted identifying photos of Baby Doe on its website and social media accounts during the fundraising campaign. The Court finds Joshua and Jonathan

Mast committed knowing violations of the Protective Order in this regard, and will find them in civil contempt.

<u>Background</u>

Contemporaneously with the filing of their complaint, Baby Doe, John Doe, and Jane Doe filed a motion for leave to proceed as Plaintiffs in the litigation using pseudonyms. Dkts. 3, 4. Plaintiffs sought a protective order that would prohibit "Defendants and their counsel and representatives from disclosing any information that directly or indirectly identifies Plaintiffs or their family members . . . including but not limited to Plaintiffs' names and the locations of their residences abroad and places of birth." Dkt. 4-3 at 1. The primary basis for those protections, Plaintiffs asserted, was that disclosure of their identities or the locations of their homes in Afghanistan would jeopardize their safety and their families' safety. Dkt. 4 at 2.

Plaintiffs submitted evidence substantiating the reasons they feared for their safety. Significantly, John Doe filed a sealed declaration in which he explained that he and Jane Doe only disclosed their true whereabouts in the United States to a few trusted family members. Dkt. 15 ("John Doe Decl.") ¶ 8. They have told everyone else that they are in Qatar or elsewhere in "the Middle East." *Id.* John Doe explained that he is "extremely worried" that if his location in the United States were to become known in Afghanistan, the Taliban would (wrongly) believe he had been helping the U.S. government-especially considering that John and Jane Doe had come to the United States during the evacuation of Afghans who worked with the U.S. military. Dkt. 4 at 4; John Doe Decl. ¶ 7. In fact, John Doe had "never worked for the U.S. government." *Id.* ¶ 7. Still, John Doe is afraid that as a result of a mistaken belief that he did, he and Jane Doe would be "in danger of physical harm or death if [they] returned to Afghanistan." *Id.* John Doe also testified that he knows that the Taliban have hurt or killed many who worked with the U.S. government, often targeting their families to pressure them to return to Afghanistan. *Id.* ¶ 8.[1] As a result, John Doe wrote of his fear that the Taliban would "harm or kill [their] families in Afghanistan," either "to punish [them]," or "because they believe that [their] families are spies for the U.S. government." *Id.* John Doe further attested that he was concerned that if his relatives or people in Afghanistan learned that Baby Doe was taken by a non-Muslim family, they would be very upset at John Doe and Jane Doe. He believes they could mistakenly think that John and Jane Doe gave her up for a chance to come to the United States, and it is illegal in Afghanistan for non-Muslims like the Masts to adopt Muslim children. *Id.* ¶¶ 9-10. Finally, John Doe also explained how if their names were disclosed, he and Jane Doe would never be able to return to Afghanistan because they would be in too much danger; and that even if just

[1] *See also* Dkt. 4 at 4-5 (citing articles documenting how Afghans who provided assistance to the U.S. government or even non-governmental organizations have faced retaliatory killings and violence after the withdrawal of U.S. forces).

the locations of their residences became known, their identities could be discovered. *Id.* ¶¶ 12-13.

The Court granted Plaintiffs' motion to proceed using pseudonyms and issued their requested Protective Order. Dkt. 26. In the Protective Order, the Court found Plaintiffs had satisfied the requisite standard for allowing litigants to proceed using a pseudonym set forth in *James v. Jacobson,* 6 F.3d 233,238 (4th Cir. 1993). Dkt. 26 at 1-2.[2] Moreover, the Court explained that:

> Plaintiffs have demonstrated that disclosure of Plaintiffs' identities and identifying information would pose a substantial risk to the physical safety of Plaintiffs and other innocent non-parties, in view of the age of minor Plaintiff Baby Doe, and concluding that any risk of prejudice or unfairness (if any should exist) is more than sufficiently mitigated by the measured steps requested by Plaintiffs' counsel below which are tailored to protect such safety interests, in order to ensure Plaintiffs' safety and the safety of other innocent non-parties.

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[2] The Court also cited its prior decision granting Plaintiffs' motion to seal John Doe's Declaration as well as other exhibits, in support of its ruling on the Protective Order. *See* Dkt. 26 at 1. In that sealing order, the Court explained how Plaintiffs' "valid concern for their safety and the safety of others," was a "significant interest" "outweigh[ing] the common law presumption in favor of the right of public access to judicial records." Dkt. 14 at 2.

Dkt. 26 at 2.

The Protective Order contained certain provisions to guard against dissemination of Plaintiffs' identifying information, including (1) a prohibition on "Defendants and their counsel and representatives" from disclosing information "that directly or indirectly identifies Plaintiffs or their family members to any person," without first securing a signed non-disclosure agreement, enforceable through a contempt sanction; (2) court papers would use the pseudonyms John Doe, Jane Doe, and Baby Doe; (3) papers that "identify any Plaintiff directly or indirectly shall be filed under seal," with redacted copies filed on the public docket; (4) Defendants shall disclose to Plaintiffs' counsel any person with whom they have shared Plaintiffs' identities and provide executed copies of the non-disclosure agreement for each such individual; and (5) certain provisions were made for use of pseudonyms during depositions. Dkt. 26 at 2-3.

Motions to Amend, Modify or Vacate the Protective Order

Defendants Joshua and Stephanie Mast, and Richard Mast, have filed motions to amend, modify, or vacate the Protective Order entered permitting Plaintiffs leave to proceed under pseudonyms. Dkts. 130, 176, 442. For the reasons set forth below, their motions are denied.

Defendants Joshua and Stephanie Mast have filed a motion to modify the Court's protective order, in which they ask the Court to reject Plaintiff John and Jane Doe's ability to proceed using a pseudonym, as well as removing any restrictions on the use of their real names. Dkt. 130 at 3.[3] They raise two principal arguments in support of their request. First, the Masts assert that John and Jane Doe have themselves spoken to the press, "to tell *their* side of the story," "undermin[ing] their claimed fear of publicity and illustrat[ing] the fundamental unfairness of allowing Plaintiffs' asymmetrical anonymity." *Id.* at 8. Specifically, the Masts point to two articles in the Associated Press ("AP")[4] and the New York Times Magazine, [5] respectively, as examples when John and Jane Doe and their attorneys "provided their version of the facts while naming the Masts." *Id.* at 5-6. After the AP story was released in 2022, the Taliban issued a statement on the internet (later taken down) stating: "According to information from reliable sources, a Marine officer Joshua Mast, [sic] has forcibly taken the only remaining child of a family martyred in their bombardment in Afghanistan from her relatives in

[3] The Masts did not object to Baby Doe remaining under a pseudonym.

[4] Juliet Linderman, et al., *Afghan couple accuse US Marine of abducting their baby,* Associated Press (Oct. 20, 2022), https://apnews.com/article/afghan-baby-us-marine-custodybattle-b157557538b84b288a0a8415735e24ab (last visited Aug. 8, 2024).

[5] Rozina, Ali, *How Did This Man Think He Had the Right to Adopt This Baby?,* The New York Times Magazine (Nov. 20, 2022), https://www.nytimes.com/2022/11/10/magazine/afghanistan-orphan-baby-1.html (last visited Aug. 8, 2024).

Virginia and registered her as his own family member." *Id.* at 6.

Second, the Masts contend that anonymity for John and Jane Doe is not warranted because John Doe's name was, for a time, publicly available in certain docket entries in the pending state-court adoption and custody proceedings involving these same parties. *Id.* at 2, 6. Thus, the Masts claim that John Doe and Jane Doe have not satisfied the *James* factors[6] for a party to proceed using a pseudonym. *Id.* at 8-11.

The Masts also argue that, regardless whether Plaintiffs are allowed to proceed using pseudonyms, the Court "must lift any restrictions on discussion of Plaintiffs" or the subject matter of this case, which they characterize as a "gag order" that violates the First Amendment. *Id.* at 12-13. They argue that requiring Defendants to (1) secure a non-disclosure agreement before sharing Plaintiffs' identities, and (2) share such disclosures with Plaintiffs, effectively constitutes a "gag order" that must survive strict scrutiny to pass constitutional muster. *Id.*

In addition, Richard Mast, a codefendant and brother of Joshua Mast, has also filed several of his own motions to vacate the Protective Order. Dkts. 176, 442. Therein, he largely repeats arguments raised in Joshua and Stephanie Mast's motion. For instance, in his initial motion, Richard characterizes the Protective Order as a "unilateral gag order,"

[6] These factors derive from *James v. Jacobson,* 6 F .3d 233, 238 (4th Cir. 1993).

which he argues is unconstitutional on grounds that it fails to satisfy the stringent "strict scrutiny" standard applicable to true gag orders. Dkt. 17 6 at 8-17. Richard trots out a parade of horribles and "absurd consequence[s]" that he claims would follow from leaving the Protective Order in place-largely on behalf of Joshua and Stephanie Mast. *Id.* at ii. For example, he asserts that the Protective Order's requirement for a non-disclosure agreement would preclude Joshua and Stephanie Mast from registering Baby Doe in school without getting non-disclosure agreements signed by teachers and administrators. *Id.* Richard Mast also contends that his own wife and other family members would have to sign a non-disclosure agreement under the terms of the Protective Order. He also claims the Protective Order is unconstitutionally vague. *Id.* at 17-18. While Richard Mast levies invectives against the Protective Order ("biased . . . asymmetrical . . . [and] extreme," *id.* at 1), the merits of his claims largely can be distilled into whether its terms constitute a true "gag order," or whether the *James* factors have been satisfied.

Recently, Richard Mast filed another motion to vacate or modify the Protective Order. Dkt. 442. He raises a bevy of arguments therein, some of which the Court has already resolved.[7] His primary new

[7] For instance, Richard Mast requested that the Court resolve outstanding motions to dismiss for lack of subject matter jurisdiction before considering the motions to vacate or amend the Protective Order, or resolving the parties' Rule 12(b)(6) motions. *See* Dkt. 442 at 6-9. And Richard elaborated

argument, however, is that the Protective Order has "effectively prohibit[ed] Defendants' defense." *Id.* at 9. For example, Richard argues that he "knows of specific individuals in Afghanistan who have, or can obtain, relevant information" supportive of Defendants' defenses, but they "will not sign non-disclosure agreements for a federal court; nor will they allow themselves to be exposed to the Taliban as witnesses for the Masts." *Id.* at 9-10; *id.* at 10 ("no Afghani will sign a U.S. non-disclosure agreement"). Thus, he argues that the Protective Order infringes not only his discovery rights but also due process rights. *Id.* at 10-11.

1. Governing Legal Standard

Rule l0(a) of the Federal Rules of Civil Procedure states that a civil complaint "must name all the parties." Fed. R. Civ. P. l0(a). That rule reflects the "general presumption of openness of judicial proceedings" grounded in the common law and First Amendment. *Doe v. Doe,* 85 F.4th 206,210 (4th Cir. 2023). Allowing a litigant to proceed in federal court under a pseudonym runs counter to public's right of access to judicial proceedings, while providing a litigant's identity furthers the openness of judicial proceedings. *Id.* at 210-11.

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further on his subject matter jurisdiction challenges. *See id.* Since the filing of Richard's motion, the Court has held that the Court has subject matter jurisdiction, rejecting his and his codefendants' arguments. *See* Dkt. 455 ("MTD Mem. Op.") at 26-61. The Court need not rehash its rulings on the topic.

Yet certain circumstances can warrant permitting a litigant to sue under a pseudonym. In some cases, "privacy or confidentiality concerns are sometimes sufficiently critical that parties or witnesses should be allowed this rare dispensation." *James,* 6 F.3d at 238. "Extraordinary circumstances" must support the request, that "balanc[e] the party's stated interest in anonymity against the public's interest in openness and any prejudice that would pose to the opposing party." *Doe v. Pub. Citizen,* 749 F.3d 246,274 (4th Cir. 2014). Whether to allow a litigant to proceed under a pseudonym is committed to the trial court's discretion. *Doe,* 85 F.4th at 211; *James,* 6 F.3d at 238.

In *James,* the Fourth Circuit identified five (non-exhaustive) factors that district courts should consider when deciding whether to allow a litigant to proceed using a pseudonym:

(1) 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;

(2) Whether identification poses a risk of retaliatory physical or mental harm to the requesting party or even more critically, to innocent nonparties;

(3) The ages of the persons whose privacy interests are sought to be protected;

(4) Whether the action is against a governmental or private party; and

(5) Relatedly, the risk of unfairness to the opposing party from allowing an action against it to proceed anonymously.

Doe, 85 F.4th at 211 (quoting *James,* 6 F.3d at 238) (cleaned up).

Defendants dispute that the *James* factors supply the legal framework that governs the propriety of the Protective Order. Defendants instead characterize the Court's order as a "gag order," which they assert is presumptively unconstitutional and must satisfy strict scrutiny. *See, e.g.* , Dkt. 176 at 7-8; *id.* at 8-16; Dkt. 130 at 12-13.

Defendants' arguments are unpersuasive. The Court did not issue a "gag order." The Court allowed Plaintiffs leave to proceed using pseudonyms: John Doe, Jane Doe, and Baby Doe. This stands in stark contrast with the actual "gag orders" issued in the gag-order cases that Defendants have cited. *In re Murphy-Brown, LLC,* 907 F.3d 788, 796 (4th Cir. 2018) (district court imposed order that "the parties, their lawyers, and all potential witnesses were not allowed to 'give or authorize *any* extrajudicial statement . . . relating to the trial, the parties or issues in this case' if such statement could reasonable reach 'public communications media' and could 'interfere with a fair trial or prejudice any plaintiff, the defendant, or the administration of justice"') (emphasis added); *Am. Sci.* & *Eng'g, Inc. v. Autoclear, LLC,* 606 F. Supp. 2d 617, 626 (E.D. Va. 2008) (ruling that "publishing false information about the Court's rulings is egregious and vexatious misconduct justifying the imposition of sanctions").

Time and again, the Fourth Circuit has explained that the decision to allow a party to proceed in litigation using a pseudonym is governed by its framework in *James v. Jacobson. E.g., Doe v. Sidar,* 93 F.4th 241,247 (4th Cir. 2024); *Doe v. Doe,* 85 F.4th 206,211 (4th Cir. 2023) ("In *James,* we set out five nonexhaustive factors for district courts to consider when deciding motions to proceed by pseudonym."); *Pub. Citizen,* 749 F.3d at 273 ("In *Jacobson,* we identified the following nonexclusive factors for district courts to consider when determining whether a party should be permitted to litigate pseudonymously ... "); *James,* 6 F.3d at 238. To be sure, a court's decision to allow a litigant to use a pseudonym involves some intrusion on the public's right of access to the courts and judicial proceedings, implicating First Amendment and common law interests. *Pub. Citizen,* 749 F.3d at 261,264. But, as the Fourth Circuit has explained, those interests are accounted for in the *James* factors. *Doe v. Doe,* 85 F .4th at 210-11; *Doe v. Sidar,* 93 F.4th at 247.

The Court also is not persuaded by Defendants' argument that the Court imposed an unconstitutional "gag order" by prohibiting Defendants from disclosing Plaintiffs' identities and identifying information concerning their residences in Afghanistan, unless Defendants first secure a signed non-disclosure agreement for every such disclosure. *See, e.g.,* Dkt. 130 at 12-13; Dkt. 176 at 12-17. It could be said that inherent in any order permitting a party to proceed under a pseudonym is an implicit command that the parties bound by the order not publicly disclose the pseudonymous litigant's real name. Such an order is a limited intrusion on the public's "interest in knowing the names of the litigants," after all. *See Public Citizen,* 749 F.3d at 273. And an order permitting a party to use a pseudonym would be of scant (if any) utility if the opposing litigant could publicly name them. Still, it would appear the better practice-which Plaintiffs followed here-to explicitly seek a protective order prohibiting Defendants' disclosure of their identities in addition to asking for leave to proceed under a pseudonym. *See, e.g., Doe v. Va. Polytechnic. Inst. & State Univ.,* No. 7:21-cv-378, 2022 WL 972629, at *4 (W.D. Va. Mar. 30, 2022) (granting the plaintiffs motion to proceed under a pseudonym and motion for a protective order prohibiting the defendants from disclosing his identity). That way, the Court would be most explicit in articulating the litigants' rights and obligations. In many respects, a protective order is a corollary to a pseudonym order. Yet that does not mean that the order allowing the pseudonym and prohibiting disclosure of the litigant's real identity becomes a "gag order" subject to strict scrutiny. Defendants have cited no precedent that would support applying the "strict scrutiny" standard under these circumstances. To the contrary, all authority supports the application of the *James* factors in considering such requests. *See id.* at* 2-4 (applying *James* factors); *Doe v. Alger,* 317 F.R.D. 37, 39-42 (W.D. Va. 2016) (applying *James* factors in decision to allow a pseudonym and entry of "a protective order prohibiting the use of [plaintiffs] real name ... during this case"). The Court will therefore consider Plaintiffs' requests using the established *James* framework.

2. Application of the *James* Factors

a. *Risk of Harm to Plaintiffs and Their Families in Afghanistan*

The *James* factor of paramount significance in this case is "whether identification poses a risk of retaliatory physical or mental harm to the requesting party or *even more critically, to innocent nonparties." See James,* 6 F.3d at 238 (emphasis added).

When the Court initially granted Plaintiffs' motion to proceed under pseudonyms, Plaintiffs presented a compelling case, based upon record evidence, that disclosure of their names would put them, Baby Doe, and innocent non-party family members in Afghanistan at great risk of physical harm. Dkt. 26 at 2. John Doe testified in a sealed affidavit that he and Jane Doe have told only a few trusted family members that they are in the United States. John Doe Decl. ¶ 6. They fear that if their identifies become known, the Taliban will wrongly believe John Doe was helping the U.S. government, though he was not. *Id.* ¶ 7. John Doe testified that he knew that the Taliban "have hurt or killed many people who worked with the U.S. government and have targeted their families to find them or pressure them to return." *Id.* ¶ 8. As a result, John Doe testified that he feared the Taliban would harm or kill their families in Afghanistan. *Id.* This and other evidence readily showed the grave safety risks that John and Jane Doe and their families in Afghanistan would face if their identities became public. *See* Dkt. 4 at 4-5 (citing reports of Taliban targeting Afghans in "retaliatory killings or violence" if they were believed to have provided assistance to United States or non-governmental organizations). In addition, John Doe testified that others in Afghanistan may erroneously believe he and Jane Doe voluntarily gave Baby Doe to the Masts for the "chance to come to the U.S."—a belief that would yet further risk visiting harm upon the Does' families in Afghanistan, as it is illegal in Afghanistan for non-Muslims to adopt Muslim children. John Doe Decl. ¶¶ 8-10; Am. Compl. ¶ 41.

Notably, besides characterizing the threat of harm as "speculation," Dkt. 149 at 6, the Masts do not directly challenge Plaintiffs' evidence or present contrary evidence that John and Jane Doe and their families would not face such a risk of physical harm or even death. Dkt. 130 at 9-10; Dkt. 149 at 6-7. This is significant. No party has presented any substantial evidence to challenge Plaintiffs' evidence that if their names become known, the Taliban could well believe (incorrectly) that John Doe had been working for the United States, and carry out violence against the Does' families remaining in Afghanistan as they have to those who provided assistance to the United States before the Taliban came to power. This evidence is just as relevant and compelling as it was when Plaintiffs first presented it.

To be sure, in some respects, the threat of physical harm imminently facing *John and Jane Doe directly* has decreased since they were granted asylum in the United States. Dkt. 415 at 8. But the threat to their families, as "innocent nonparties," has become only more real and acute. And the evidence before the Court demonstrates a continuing, clear, and substantiated risk of physical harm to Plaintiffs' families in Afghanistan, should their identities become public. As Plaintiffs' counsel articulated and have supported with evidence, there already have been several instances in which certain known members of Plaintiffs' families in Afghanistan appear to have been directly targeted by shadowy figures alluding to Plaintiffs and/or Baby Doe. *See* Dkt. 415-3 ("John Doe USCIS Decl.") ¶¶ 55-75; *see also* Dkt. 436 ("May 2024 Hr'g") at 31 (arguing that "innocent parties still remain in Afghanistan"). The Court finds that the threat to Plaintiffs' families in Afghanistan, if Plaintiffs' identities become known, is anything but speculative.

The Masts have several counterarguments—but no supporting evidence—for why this risk-of-harm factor should not weigh in favor of John and Jane Doe's continued pseudonymity. First, they argue that Plaintiffs' "willingness to speak to the news media entirely undermines their prior representation to this Court that they fear the consequences of media coverage about the case."

Dkt. 130 at 9-10; Dkt. 149 at 1, 6 (similar). There is no dispute that Plaintiffs John and Jane Doe spoke to two media outlets (the AP and the New York Times) about this case. Dkt. 137 at 6 (noting Plaintiffs' "decision to speak with select members of the press ... only with express guarantees from those journalists to identify them only with pseudonyms"); Dkt. 167 ("MTD Hr'g") at 80. Plaintiffs explained that they did so after their lawyers received requests for comment from news outlets, and they believed the "story was going to be covered," and they wanted to do so with "two entities that they trusted." MTD Hr'g at 80. Yet critically, Plaintiffs did so only giving their names to the media outlets on condition of anonymity; the organizations honored that commitment to their anonymity; and as a result, the outlets did not include their names or photographs, or other identifying information that would undermine the anonymity Plaintiffs requested, and the Court countenanced in the Protective Order. *See supra* at 5 nn.4-5.[8] Nothing in the limited outreach by Plaintiffs to these two media outlets, under the identity-protecting terms described, undermines the Court's assessment of the risk of physical harm that

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[8] To the extent that the Masts have argued that the allowing Plaintiffs to proceed using pseudonyms in view of their press outreach is "highly prejudicial" to the Masts and the other named defendants because it "inflame[s] the public against the Masts [and] invites harm upon them," Dkt. 130 at 10; Dkt. 149 at 6-7, the Court will consider such arguments in considering the fifth *James* factor: "the risk of unfairness to the opposing party from allowing an action against [them] to proceed anonymously." *See James,* 6 F.3d at 238.

would be occasioned by disclosure of Plaintiffs' identities, particularly to innocent third parties-namely, Plaintiffs' families living in Afghanistan.

The Masts also argued that Plaintiffs' request to use pseudonyms is undermined by the fact that, for a time, the Virginia custody and adoption proceedings publicly identified John and Jane Doe by their real names on the public case docket. Dkt. 130 at 2, 6. However, the Virginia Court of Appeals later unequivocally accepted John and Jane Doe's assertions "that the danger flowing from identification affects not only themselves but also family members who are not parties to the underlying litigation." Dkt. 168 at 2 (citing Dkt. 168-1 at 2). That court then allowed the parties to proceed in the state-court litigation using their fust and last initials. The Masts' argument in this regard is therefore unfounded. To the contrary, the subsequent ruling of the Virginia Court of Appeals provides yet further support for finding a continued risk of physical harm to Plaintiffs' families if Plaintiffs' identities become known.

Finally, the Masts argue in a recent filing that certain newly discovered evidence undermines Plaintiffs' assertion that the Protective Order is necessary to protect their identities and their family members in Afghanistan. Dkt. 415 at 14-15. In the Masts' view, "the facts establish that anyone in Afghanistan can readily discern who the Does and the child in this case are." *Id.* at 15. The Masts' argument fails. For one, the evidence the Masts marshal falls far short of showing that "anyone in

Afghanistan can readily discern" who Plaintiffs and their families are. Second, there is a vast gulf between the relief that the Masts seek—i.e., that the two adult Plaintiffs' names are included in the case caption and docket for anyone to see, versus evidence that certain interested persons with ample resources and inclination may be able to connect the dots. Substantial safety considerations remain for Plaintiffs' families still living in Afghanistan. As a result, the Court must require a far greater evidentiary basis that the Protective Order is no longer fulfilling its intended function before the Court will jettison the Protective Order and spotlight Plaintiffs' identities.

Accordingly, the Court finds that the "risk of physical or mental harm" *James* factor weighs significantly in favor of retaining Plaintiffs' pseudonymity.

b. *Age of the Person Seeking Anonymity*

Another *James* factor considers "the ages of the persons whose privacy interests are sought to be protected." *See James,* 6 F.3d at 238. This factor bears little on the disputed issues before the Court. Plaintiffs John and Jane Doe do not argue that *their* ages counsel in favor of anonymity. *See* Dkt. 137 at 11-12; Dkt. 149 at 7-8. And as to Baby Doe, no Defendant argues that she should not be afforded protection of a pseudonym, given that she is a minor. Dkt. 130 at 3; Dkt. 137 at 11; Dkt. 176 at 1.

The only dispute on this factor is that the Masts argue that Baby Doe should not be referred to as

"Baby Doe," as they believe this particular pseudonym "false[ly] and unfairly implies that the Mats' adoptive daughter is not related to them but is instead related to Plaintiffs." Dkt. 130 at 10. Rather, the Masts contend that she should be referred to by "the initials of Baby Doe's legal name . . . because she is the Masts' adopted daughter." Dkt. 149 at 7. The Court will not change Baby Doe's pseudonym. Innumerable docket entries and briefs in this action so refer to her. And the Masts' argument about unfair implications of the pseudonym "Baby Doe" is unfounded—the Court has been clear that "[t]his federal case does not involve adoption or custody," which are matters being addressed in the Virginia courts. Dkt. 455 ("MTD Mem. Op.") at 4. The Court will not wade into those waters to resolve a dispute over which pseudonym is preferable. Put simply, nothing should be read into the Court's use of the pseudonym, "Baby Doe," except that the Court found that the child's true identity should not be made public under the *James* factors.

c. *Whether the Case Involves a Sensitive and Highly Personal Matter*

The Masts next argued that the subject matter of this case is not of a "sensitive and highly personal" matter, largely on the basis that Plaintiffs and their attorneys have "discuss[ed] it with the media" as have their attorneys. Dkt. 130 at 9; Dkt. 149 at 4; *see James,* 6 F.3d at 238.

The Court disagrees. This case involves an alleged scheme by the Masts and their codefendants to dupe Plaintiffs into bringing their young daughter Baby Doe to the United States to receive specialized medical care, only to have the Masts abduct Baby Doe once they arrived in the United States. The fact that Plaintiffs and their attorneys engaged in limited outreach to the press on a few occasions, and on condition that their anonymity was preserved, does not detract from the sensitive and highly personal nature of this case. Moreover, the record does not support any suggestion that Plaintiffs sought anonymity "merely to avoid the annoyance and criticism that may attend any litigation." *See James,* 6 F.3d at 238. Rather, the record shows that Plaintiffs have acted on a more-than-good-faith fear that publication of their names or other identifying information will result in substantial risk of physical harm to their family still in Afghanistan. The Court finds that this factor also weighs in favor of retaining Plaintiffs' pseudonymity.

d. *Whether the Case Is Against a Governmental or Private Party*

Next, the Court considers the fourth *James* factor, "[w]hether the action is against a governmental or private party." *See James,* 6 F.3d at 238. Plaintiffs initially filed this action against both private individual defendants (the Masts, et al.) as well as two federal cabinet officials as "nominal defendants" in their official capacities. Dkt. 68 ("Am. Compl.") at 1 (Caption). Subsequently, however, Plaintiffs filed a stipulation of dismissal against the two federal officials, leaving only private parties as defendants. Dkt. 270. To be sure, when a litigant only sues a governmental party, courts have generally been more likely to allow a plaintiff leave to proceed under a pseudonym. *Alger,* 317 F.R.D. at 41. The rationale underlying that factor is that a case against a government "do[es] no harm to its reputation." *Id.* Conversely, when a litigant only sues a private party, this factor is more likely to weigh against allowing anonymity or pseudonymity. *See Doe,* 85 F.4th at 215. That is because a suit against private parties "may damage their good names and result in economic harm." *Alger,* 317 F.R.D. at 41.

Notwithstanding the initial inclusion of the two federal officials as defendants, the Court finds that this factor does weigh somewhat against retaining John and Jane Doe's pseudonymity, as Plaintiffs brought the case against several private individuals and they remain the only defendants in this action. To be sure, the Masts argue stridently that "[t]his is ... not a case where the plaintiffs have sought bilateral pseudonymity to protect *both sides* in a private dispute," but rather, charge that Plaintiffs "are using their pseudonymity to shield themselves while publicly attacking the Masts." Dkt. 130 at 10. This argument sounds in both the fourth *James* factor (identity of the opposing party), and the fifth James factor (the "risk of unfairness to the opposing party from allowing an action against it to proceed anonymously"). Yet the Fourth Circuit has explained that it would be improper for a court to adopt a "flat rule" that "the fairness factor always counsels against letting a plaintiff in a civil action use a pseudonym at trial unless the defendant is also using one." *See Sidar,* 93 F.4th at 248. This admonition similarly counsels against attributing overbearing weight solely to this one factor-the identity of the opposing party-especially when, as here, the Court finds that other factors, namely the risk of retaliatory and physical harm, weigh heavily in favor of granting protection. Thus, the Court finds that the fourth *James* factor weighs somewhat against retaining pseudonymity, yet the Court finds that the weight of this factor on the Court's cumulative assessment of the *James* factors is leavened considerably by the presence of the other *James* factors.

e. *Risk of Unfairness to Party Opposing the Pseudonym*

Lastly, the Court considers the "risk of unfairness to the opposing party from allowing an action against it to proceed anonymously." *See James,* 6 F.3d at 238. The parties' arguments on this factor mirror in some respects their arguments on the prior factor-that the case is brought against private parties rather than a government.

The Masts' argument in this regard largely focuses on the perceived unfairness of Plaintiffs' seeking anonymity while they have been publicly named as Defendants in the action. Dkt. 130 at 10--11. They argue that it is "highly prejudicial" for the Court to allow Plaintiffs "to enjoy the cloak of pseudonymity," while they "have shared their false and defamatory accusations against the Masts with the media and indeed the world." *Id.* at 10-11. The Masts argue that "Plaintiffs' speaking to the media has resulted in" negative publicity about them; various posts by others on social media claiming, among other things, Joshua Mast committed a "war crime"; and certain outlets publicizing photos of the Masts' biological children and disclosure of the town where they live. *Id.* at 11; Dkt. 149 at 8 (arguing that allowing Plaintiffs to proceed under pseudonyms "is exceptionally unfair to the Masts because the Plaintiffs have used pseudonymity to draw public attention to the private family matters of the Masts").

Again, the Fourth Circuit has admonished courts that the fairness factor does not "always counsel[ ] against letting a plaintiff in a civil action use a pseudonym at trial unless the defendant is also using one." *See Sidar,* 93 F.4th at 248. That is not to say the issue is irrelevant—just that the Court's consideration of the fairness factor must be grounded in the specifics of the case, and not any general aversion to one-sided anonymity requests. In this case, any potential unfairness to the Masts is greatly mitigated by one fact—they have always known Plaintiffs' identities. Thus, the Masts cannot persuasively argue in seeking to modify the Protective Order that Plaintiffs' use of pseudonyms has hindered the Masts' ability to mount a defense-as it might in a case in which the defendants do not know the plaintiffs' identities. *See Student A v. Liberty Univ., Inc.,* 602 F. Supp. 901, 920 (W.D. Va. 2022) (finding that the "unfairness factor" was "significantly mitigated by named Plaintiffs' willingness to provide names and other discovery to certain Defense counsel and limited persons at

Liberty so that they could prepare its defense"); *Doe v. Rector & Visitors of George Mason Univ.,* 179 F. Supp. 3d 583, 594 (E.D. Va. 2016) (finding this factor did not weigh against allowing plaintiff to use a pseudonym when there was "no indication" defendants "faced any hardship in mounting an effective defense as a result").

Richard Mast has raised a related argument challenging other provisions in the Protective Order, namely the requirement that persons to whom Defendants or their representatives disclose Plaintiffs' true identities must sign a non-disclosure agreement. Dkt. 442 at 9-11. He claims unfairness arising from the Protective Order that, in his view, not only undermines his discovery rights but also due process rights.[9] *See id.* The Court finds, at this time, the argument both speculative and underdeveloped. While Richard Mast says he "knows of specific individuals" who could be helpful to his case but from whom he cannot get information on account of the Protective Order, *see id.* at 9-10, he offers no specific facts, much less evidence, to substantiate the assertion. It is further entirely unclear why, for instance, these individuals' concerns to not "allow themselves to be exposed to the Taliban as witnesses for the Masts," counsel *against* the provisions of *this* Protective Order (to

[9] Counsel for Joshua and Stephanie Mast made a similar point at oral argument in May, calling it a "genuine problem," but similarly did not back it up with any evidence or specifics at that time, or in the months that have followed. *See* May 2024 Hr'g at 40.

protect the identities of Plaintiffs), rather than seeking from the Magistrate Judge *a discovery protective* order that would include measures to protect other potential witnesses' safety. *See* Fed. R. Civ. P. 26(c)(l). The Court also notes that Richard Mast has been engaging in discovery and has opposed other parties' motions for discovery protective orders.[10] Without further development, the Court finds at this time that this argument does not support any unfairness to Defendants under this *James* factor.[11]

The Masts attempt to claim *"Plaintiffs' speaking to the media* has resulted in pictures of the Masts' other children being widely disseminated and in disclosing the town in which the Masts' live." Dkt. 130 at 11 (emphasis added). As objectionable as that other outlet's publication of photos of the Masts' biological children may be, there is no basis to

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[10] *See* Dkt. 452 at 2 n.2 (explaining that Richard has "served 139 requests for production, 7 interrogatories, 7 requests for admission, and at least one third-party subpoena"); Dkts. 171, 210.

[11] Richard Mast attempts to distinguish *James* on the basis that the case "involved matters and witnesses in the U.S., not Afghanistan controlled by the Taliban," and that, "in *James,* there was no threat of murder or mayhem if a witness for the defense were to be asked to a sign a nondisclosure agreement." Dkt. 442 at 11 . If anything, the location of the witnesses would appear to point in precisely the opposite direction: rendering even more important the need for the provisions of the Protective Order, and, were Defendants to substantiate the need, protections for non-party witnesses in a separate discovery protective order. Fed. R. Civ. P. 26(c)(l).

believe that *Plaintiffs' statements* to the media prompted this disclosure, as the Masts argue. Nor does the Court find persuasive the Masts' attempt to lay directly at Plaintiffs' feet all the vitriol the Masts have received from comers of social media for their alleged conduct that underlies Plaintiffs' claims in this case. *See* Dkt. 130 at 10-11. There is no evidence to support that Plaintiffs, for example, were egging on those who subjected the Masts to online abuse.

The Masts have also highlighted a statement issued by the Taliban condemning the Masts as demonstrating the perceived unfairness that the Court "should shield [Plaintiffs] (and only [Plaintiffs]) from public scrutiny or criticism." *Id.* at 1-2. The Court need not discount that the Masts would have legitimate concerns about the issuance of such a statement. Yet that does not negate or undermine the safety risks Plaintiffs demonstrated that their families who are living in Afghanistan would face, should Plaintiffs' identities come to light. *See* Dkt. 137 at 10.

At bottom, the Masts' objections are largely based on the perceived unfairness that *they* (the Masts) have not been afforded anonymity, rather than the risk of unfairness to them (the Masts) from allowing *Plaintiffs* to litigate the case under pseudonyms. *See James,* 6 F.3d at 238.

The Court finds that, though the Masts have undoubtedly faced the harsh glare of the media spotlight following initiation of this litigation and the ongoing Virginia proceedings, the Masts have not demonstrated that the "risk of unfairness"

James factor tilts in favor of jettisoning Plaintiffs' anonymity. Indeed, the Virginia Court of Appeals reached a similar conclusion when it determined that the litigants could file in that court using only their initials. *See* Dkt. 168 at 2; Dkt. 168-1. In so ruling, that court rejected the Masts' identical argument that "they would be 'highly prejudic[ed]' by allowing the proceedings to go forward anonymously, because [the Masts'] names have been used in media and social media while [Plaintiffs] continue to enjoy the cloak of pseudonymity." *See* Dkt. 168-1 at 2. Ultimately, the Virginia Court of Appeals found paramount the risk of "danger flowing from [Plaintiffs'] identification," which would affect "family members who are not parties to the underlying litigation." *Id.*

3. <u>Conclusion</u>

Having considered the *James* factors, the Court finds that the "risk of harm" factor—particularly the risk of physical injury or even death facing Plaintiffs' relatives currently living in Afghanistan should Plaintiffs' identities become known—is of paramount significance. The Court also finds Plaintiffs did not initiate this lawsuit pseudonymously merely to avoid annoyance and criticism that attends any litigation, but rather based on a well-founded concern of risk of physical harm-another *James* factor that weighs in Plaintiffs' favor. That the case is against private parties weighs, to a degree, in the Masts' favor. But the Masts have not demonstrated any unfairness from allowing *Plaintiffs* continued leave to proceed under pseudonyms, much less unfairness to such a degree as would counterbalance the threat of physical harm facing Plaintiffs' families in Afghanistan. On balance, then, the Court finds that the *James* factors weigh decisively in favor of retaining the Protective Order; that Plaintiffs have demonstrated that "exceptional circumstances" warrant the Court's affording them the "rare" ability to litigate using pseudonyms, *see Pub. Citizen,* 749 F.3d at 273 (citing *James,* 6 F.3d at 238); and that, as a result, Plaintiffs may continue to proceed in this litigation using their respective pseudonyms.[12]

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[12] Even if strict scrutiny applicable to true "gag orders" governed the validity of the Protective Order-and it does not-the Court would conclude that Plaintiffs have established that such standard is met. Here, there is a "compelling" public interest in preserving Plaintiffs' safety and the safety of their families, who are innocent nonparties. *See Kolbe v. Hogan,* 849 F.3d 114, 139 (4th Cir. 2017) (en bane) (a state's "interest in the protection of its citizenry and the public safety is not only substantial, but compelling"), *rev'd on other grounds, NY. State Rifle & Pistol Ass 'n,* 597 U.S. 1 (2022); *cf Int 'l Refugee Assistance Project v. Trump,* No. 17-cv-361, 2017 WL 818255, at *2 (D. Md. Mar. 1, 2017) (holding that privacy concerning litigants' faith and immigration status supported anonymity because, "if disclosed, [it] could jeopardize their safety in foreign countries").

Moreover, the Court finds that the limited measures imposed in the Protective Order—use of pseudonyms, prohibiting identification of Plaintiffs' identities and where they were from, absent securing a non-disclosure agreement, etc.—are not only "narrowly tailored to serve their intended purpose," but constitute "the least restrictive means" to ensure Plaintiffs' safety and that of their families still living in Afghanistan. *See In re Murphy-Brown,* 907 F.3d at 799

Accordingly, the Court will **DENY** Defendants' motions to amend, modify or vacate the Protective Order. Dkts. 130, 176, 442.

Motions to Hold the Masts in Civil Contempt for CBS Interview

Plaintiffs first filed a motion to show cause why Defendants Joshua and Stephanie Mast should not be held in civil contempt for violating the Court's Protective Order. Dkt. 141. In the motion, Plaintiffs charge that they were "stunned to see a CBS television segment" that included "photographs and

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(citations omitted). Defendants suggest that leaving the Protective Order in place would spawn a parade of horribles, including that it would preclude them from enrolling Baby Doe in kindergarten absent the teacher signing a non-disclosure agreement. Dkt. 176 at ii, 17; Dkt. 149 at 9-10. Defendants' artificially expansive interpretation of the Protective Order is unmoored from its text. It limits Defendants' identification of Plaintiffs as *such-Plaintiffs in this case-as* well as identification of Plaintiffs' family members. *See* Dkt. 26 at 2-3; Dkt. 188 at 3--4. Simply put, the commonsense provisions in the Protective Order cannot reasonably be read to require that anyone interacting with Baby Doe (e.g., her teacher) must execute a non-disclosure agreement first, when she has not been identified in connection with this litigation. Giving the Protective Order its natural meaning, Defendants have not identified any less restrictive means than those set forth in the Protective Order that would safeguard such compelling safety interests. *See* Dkt. 130 at 12-13. Thus, Defendants' arguments that the Protective Order fails to satisfy the strict scrutiny standard are without merit, both because that is not the governing legal framework, and because the Protective Order does satisfy that test. Nor for these reasons can the Protective Order be considered unconstitutionally vague.

video imagery of Baby Doe that CBS could have obtained only from the Masts or with their explicit permission." *Id.* at 2. They also took exception to other photographs shown in the news segment, as well as instances during the interview in which Joshua and Stephanie Mast identify Baby Doe from a photograph and describe the physical injuries she sustained in some of the events underlying this lawsuit. *Id.* Plaintiffs assert that by this conduct, the Masts have "imperiled" their safety as well as that of Plaintiffs' families. *Id.* Thus, Plaintiffs contend that the Masts committed a knowing violation of the Protective Order that warrants a civil contempt sanction. *Id.*

The next day, Plaintiffs filed a supplemental motion for an order to show cause based on a "second installment" of the CBS program. Dkt. 142. Plaintiffs claimed that the second program provided "additional evidence of the Masts' contumacious conduct," depicting photos and videos "that could have been obtained only from the Masts," and during which "Joshua Mast is shown passing unknown materials to the CBS reporter." *Id.* at 2.

In the Fourth Circuit, courts employ a burden-shifting framework to determine whether a party should be found in civil contempt. *Consumer Fin. Prof. Bureau v. Klopp,* 957 F.3d 454, 462 (4th Cir. 2020). At the first step, a party moving for civil contempt must prove four elements by clear and convincing evidence:

(1) The existence of a valid decree of which the alleged contemnor had actual or constructive knowledge;

(2) That the decree was in the movant's favor;

(3) That the alleged contemnor by its conduct violated the terms of the decree, and had knowledge (at least constructive knowledge) of such violations; and

(4) That the movant suffered harm as a result.

De Simone v. VSL Pharms, Inc., 36 F.4th 518,529 (4th Cir. 2022) (quoting *Ashcraft v. Conoco, Inc.,* 218 F .3d 288, 301 (4th Cir. 2000) (cleaned up in *De Simone)).* If the movant establishes these elements, the burden then shifts to the alleged contemnor "to demonstrate that she made in good faith all reasonable efforts to comply with the decree." *De Simone,* 36 F.4th at 529 (cleaned up). If the alleged contemnor fails to show good faith in making all reasonable efforts to comply with the order, they may be held in contempt. *Klopp,* 957 F .3d at 461-62. Civil contempt orders and the appropriateness of consequences crafted for violating court orders fall within the district court's discretion. *Id.* at 461.

During the hearing on Plaintiffs' motion to show cause, as well as on other motions, the Court heard testimony from Joshua Mast concerning the circumstances underlying his and Stephanie's involvement in the CBS interview. *See* MTD Hr'g at 98-111. Having heard the testimony and argument thereon, and considered other evidence submitted on this subject, the Court **finds,** with respect to the

CBS interview, that Plaintiffs **have not shown** by clear and convincing evidence that either Joshua Mast or Stephanie Mast violated the terms of the Protective Order and had knowledge at the time of such violations. *See De Simone,* 36 F.4th at 529. Moreover, even if Plaintiffs had shown this element-and they have not-the Court would conclude that the Masts had established that in good faith they made all reasonable efforts to comply with the Protective Order with respect to the CBS interview. *See id.*

The Court finds significant that (1) the Masts themselves never disclosed Plaintiffs' names, nor themselves provided identifying information where Baby Doe was found,[13] (2) Joshua Mast's testimony is unrefuted that third parties had provided CBS with the other photographs of Baby Doe,[14] (3) Joshua Mast testified that when CBS asked for permission to show photographs of Baby Doe, he "told them that we did not authorize anything that showed her face,"[15] and finally (4) Joshua Mast also

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[13] MTD Hr' g at 99 (Joshua Mast, testifying that "we tried to stick with the . . . intent of that protective order. That's why we didn't talk about them [Plaintiffs] at all. We didn't name them. We didn't talk about where they're from in Afghanistan, that type of thing.").

[14] MTD Hr'g at 102-03 (Joshua Mast, testifying that CBS "didn't get those from us," referring to the photographs of Baby Doe showing her face); id. at 104-05 (testifying that he believed the protective order reflected a difference between "providing things that identify [Baby Doe] and [CBS] getting that from independent sources").

[15] MTD Hr'g at 102 (Joshua Mast testimony)

testified, without contradiction, that he only "gave" photographs of Baby Doe to CBS that did not show her face.[16]

Of course, in the interview, Joshua Mast did identify Baby Doe from a photograph that the reporter says was "provided" to them. Yet the tenor of his response to the reporter ("I would say that's one of my favorite photos of her . . . "), reflect little more than an accidental slip, rather than a knowing violation of the Protective Order. The Court also views Stephanie Mast's response concerning Baby Doe's injury in a similar light. Because the Court finds—with respect to the Masts' challenged conduct during the CBS interview—that Plaintiffs have failed to establish that Joshua and Stephanie Mast knowingly violated a term of the Protective Order. Alternatively, the Court finds that even if Plaintiffs had made a prima facie showing of all four elements of civil contempt,[17] the Masts established that they

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[16] MTD Hr'g at 106. To be sure, Joshua Mast did testify that he did "show" the CBS reporter photographs of Baby Doe as a baby that did show her face, but he did not "give" the photographs to the reporter. *Id.* at 107. To the extent this act evidences a violation of the Protective Order, the Court does not consider the violation such as would undermine the Court's conclusion that Joshua and Stephanie Mast acted in good faith in making all reasonable efforts to comply with the Protective Order vis-à-vis the CBS interview.

[17] Because the Court held there was no knowing violation of the Protective Order, the Court need not address the other elements of civil contempt with respect to this motion.

had taken in good faith all reasonable steps to comply with the Protective Order.

Accordingly, the Court **DENIES** Plaintiffs' Motion to Show Cause and Supplemental Motion to Show Cause why Joshua and Stephanie Mast Should Not Be Held In Civil Contempt, with respect to the CBS interview. Dkts. 141, 142.

Motion to Hold Joshua Mast and Jonathan Mast in Civil Contempt for Communications with the "Pipe Hitter Foundation"

Plaintiffs have also filed a motion to hold Joshua Mast and one of his brothers, Jonathan Mast, in civil contempt, for violating the Protective Order when they were enlisting an organization called the "Pipe Hitter Foundation" or "PHF" to implement a fundraising campaign for Joshua and Stephanie Masts' legal defense in this case. Dkts. 231,403.[18] In the course of that fundraising campaign, the organization posted numerous identifying photos of Baby Doe on its website and social media accounts.

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[18] Plaintiffs initially sought a civil contempt sanction against Stephanie Mast as well, but they later withdrew the request "because discovery revealed no evidence that she was actively involved in Joshua Mast's scheme" with respect to the Pipe Hitter Foundation. Dkt. 403 at 2 n.1. In addition, Plaintiffs represented that "[d]iscovery further suggested that PHF was an innocent pawn," and that once Plaintiffs' counsel informed it of the Protective Order, "PHF acted promptly to pull down the social media posts" at issue in Plaintiffs' motion. *Id.* As a result, Plaintiffs also withdrew their request "that PHF be held in contempt as aiding and abetting Joshua Mast's violation of the Protective Order." *Id.*

Noting arguments made in the briefs that outstanding discovery would be material to the issue, the Court granted a continuance so that the parties could conduct such discovery. Dkt. 263. Subsequently, the parties filed and the Court has considered prehearing memoranda and evidence, Dkts. 403, 415, the Court heard argument on the motion to hold Joshua and Jonathan Mast in civil contempt, Dkt. 436 ("May 2024 Hr'g"), and the Court received and considered post-hearing submissions, including the first filing from Jonathan Mast, Dkt. 437,438. Upon consideration of the submissions and evidence, the Court makes the following findings of fact.

The Pipe Hitter Foundation is a 501(c)(3) non-profit organization that, among other things, provides financial support, legal defense grants, and otherwise advocates for service members, first responders and their families.[19] In early 2023, Joshua Mast initiated discussions with PHF in order to raise money for his legal defense in this case.[20] On January 7, 2023, Joshua emailed PHF background information on this case, and, significantly, also sent his contact within the organization a Google photo album that included hundreds of identifying

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[19] Dkt. 257-2 ("Disarro Decl.") ¶¶ 7-9.

[20] Dkt. 239-1 ("Joshua Mast Decl.") ¶ 6. Joshua Mast made the initial outreach through Brian Ferguson, an attorney with whom PHF had previously partnered. Disarro Decl. at 2 ¶¶ 20-24.

photographs of Baby Doe.[21] When he sent the photographs to PHF, Joshua Mast did not inform the organization about the Protective Order, much less secure a non-disclosure agreement.[22] From January to March 2023, identifying photographs of Baby Doe were circulated amongst staff and the board of the PHF, when it was considering and later approved a legal defense grant for the Masts.[23]

The executive director of PHF only learned about the Protective Order in March 2023, when Joshua Mast told her about it.[24] While Joshua Mast told PHF's Executive Director that the Protective Order (which he called a "gag order") prevented *him* from speaking publicly about the case, Joshua Mast suggested that his brother, Jonathan Mast, could instead act on their behalf in that public-facing capacity.[25] Joshua then called Jonathan to let him

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[21] Dkt. 407-6 ("Pls' Ex. R") at ECF 2-3 (email); Dkt. 407-4 ("Pls' Ex. L") (Google folder, including photographs).

[22] *See id.; see also* Disarro Decl. ¶ ¶ 23-24, 28, 54-55.

[23] Disarro Decl. ¶¶ 25-32, 36-37, 54.

[24] Disarro Decl. ¶¶ 54-55. To the extent Joshua Mast testified that he *"from the outset* explained to [PHF] that due to the Court's gag order and its restrictions on identifying our daughter in this suit, we were essentially unable to defend ourselves ... ", Joshua Mast Decl. ¶ 6 (emphasis added), the Court finds more credible, persuasive, and supported by evidence the more detailed account by Ms. Disarro that she only learned of the Protective Order in March 2023. *See* Disarro Decl. ¶¶ 54-56; *id.* ¶¶ 19-55 (background).

[25] Disarro Decl. ¶¶ 55-57, 60-64.

know he could expect to hear from PHF's executive director.[26]

This evidence severely undermines the credibility of Joshua Mast's statements, made under oath, that "[his] understanding is the [PHF] subsequently reached out to [his] family members," and that in February or March 2023, "Stephanie and [Joshua] learned that [his] brother, Jonathan Mast, had coordinated with the [PHF] to raise money for [their] expenses."[27] Those statements would suggest that Joshua Mast was totally ignorant of the connection between his brother and PHF, that those two nonparties independently began working together without his knowledge. But Joshua's testimony omits material context that is supported by persuasive and consistent evidence before the Court: that he (Joshua) had prearranged with both PHF and Jonathan to have Jonathan serve as point of contact and spokesperson for the Masts' legal defense campaign. Considering this evidence, the Court finds that Joshua Mast knowingly designated Jonathan Mast to serve as his and Stephanie Mast's "representative," within the meaning of the Protective Order. *See* Dkt. 26 at 2 (¶ 1).

For his part, Jonathan Mast testified that he was familiar with the Protective Order before he heard from PHF, and that he understood that its purpose was to protect the identities of John Doe, Jane Doe,

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[26] *See* Dkt. 403-6 ("Jonathan Mast Dep.") at 49-50, 56, 76-77.

[27] Joshua Mast Decl. ¶¶ 8-10.

and Baby Doe.[28] Nonetheless, on May 10, 2023, Jonathan Mast sent PHF emails containing about twenty identifying photos of Baby Doe.[29]

At this time, Joshua Mast was aware that his brother Jonathan was working with PHF.[30] Still, PHF continued to communicate with Joshua Mast about the fundraising campaign.[31] After PHF sent Joshua Mast the legal defense grant agreement, Joshua said that he could not sign it due to the "gag order."[32] Instead, Joshua Mast told his contact at PHF to speak to Jonathan about the grant agreement; Jonathan was the one who ultimately signed this agreement on May 10, 2023.[33] The grant agreement provided that PHF would be "implementing a fundraising campaign in support of Joshua Mast and his family."[34] Following the fundraising campaign, PHF transferred $5,000 to

[28] Jonathan Mast Dep. at 54-55; *id.* at 32-33.

[29] Dkt. 407-3 ("Pis' Ex. J") (email from Jonathan Mast to Ms. Disarro); *see also* Jonathan Mast Dep. at 86 (testifying that, "I sent some photos from this [Google photo album] to Pipe Hitter Foundation").

[30] *See, e.g.,* Joshua Mast Decl. ¶ 10; Jonathan Mast Dep. at 145.

[31] Disarro Decl. ¶¶ 69-73.

[32] Disarro Decl. ¶ 74.

[33] Disarro Decl. ¶¶ 74-75, 81 ; Dkt. 403-11 ("Pls' Ex. K") (executed grant agreement).

[34] Pls' Ex. Kat ECF 3.

Jonathan Mast on May 19, 2023, the entirety of which went to Joshua Mast.[35]

In the course of its fundraising campaign from May to June 2023, PHF published on its website and social media accounts information about this case, including numerous photos of Baby Doe that showed her face.[36] Joshua Mast and Jonathan Mast had sent several of these identifying photos of Baby Doe to PHF, which later published them on its fundraising pages.[37] As part of that fundraising campaign, Jonathan Mast also appeared on One America News Network to describe his family's side of the events involving Baby Doe.[38] In the interview, Jonathan Mast mentioned the ongoing state court litigation as well as this federal action, and he also solicited donations for the Masts' legal defense through the PHF website.[39] Moreover, during that interview, several identifying photos of Baby Doe

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[35] Disarro Decl. ¶ 109; Jonathan Mast Dep. at 69-70.

[36] Disarro Decl. ¶ 25; Dkt. 407 ("Pls' Ex. A") (screenshots of PHF website donation page for Masts).

[37] These included an unredacted photo of Joshua Mast holding Baby Doe, and an unredacted photo of Stephanie Mast sitting next to Baby Doe. *Compare* Pls' Ex. A at ECF 2-4 (PHF donation page) *with* Pls' Ex. J at ECF 3-4 (photos sent by Jonathan Mast to PHF), and Pls' Ex. L at ECF 2, 10 (Google photo album). *See also* Disarro Decl. ¶¶ 25-27 (explaining that several photos of Baby Doe that were included in the Google photo album were ultimately used by PHF).

[38] Dkt. 403 at 13-14 (and accompanying record citations); Jonathan Mast Dep. at 139.

[39] *See id.*

were shown-photos which Jonathan Mast had sent to the media outlet as well.[40]

Accordingly, the Court finds, by clear and convincing evidence, that both Joshua and Jonathan Mast, by their conduct, violated the terms of the Protective Order and that they had knowledge (and at least constructive knowledge) of such violations. *See Ashcraft,* 218 F.3d at 301 . The Protective Order prohibited "Defendants and their ... representatives" "from disclosing any information that directly or indirectly identifies Plaintiffs or their family members to any person ... unless that person first executes a non-disclosure agreement." Dkt. 26 at 2. Joshua and Jonathan Mast both shared identifying photographs of Baby Doe with PHF and Jonathan sent them to One America News Network, which the organizations published on their websites and social media accounts.[41] Of course, neither executed a non-disclosure agreement, nor did Joshua or Jonathan ask them to do so.

Defendants argue that Joshua Mast did not knowingly violate the Protective Order, claiming that Jonathan Mast had "acted on his own accord and was not directed or asked to provide photos of Baby Doe." Dkt. 415 at 18; Dkt. 437 at 11-12. The Court finds that argument carries little weight. For one, Joshua and Jonathan Mast each provided identifying photos of Baby Doe to PHF, ignoring the

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[40] Jonathan Mast Dep. at 139-40.

[41] *See* Pls' Exs. A, J, L, R; Jonathan Mast Dep. at 86, 139-40; Disarro Decl. ¶¶ 25-27.

Protective Order's express requirements. Further, the evidentiary record demonstrates that Joshua Mast not only orchestrated Jonathan serving as his and Stephanie's public-facing point of contact with PHF, but also that Joshua and PHF continued to communicate afterward.[42] And, further still, the Court finds uncredible Defendants' story that Joshua and Jonathan's actions vis-à-vis PHF were independent. For instance, Defendants wrote in their initial opposition brief that "Joshua and Stephanie Mast had no knowledge that Jonathan Mast was speaking with the [PHF] . . . until after Jonathan had already done so." Dkt. 239 at 3. But that wasn't entirely true: Joshua knew that they were in touch.[43] And, in any event, the statement falls apart in the face of credible evidence showing continued communication between Joshua and Jonathan concerning the fundraising campaign.[44] Joshua Mast's sworn declaration was, at best, misleading, in that it indicated that PHF and Jonathan had independently sought to work

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[42] In fact, because Joshua Mast communicated with PHF by an electronic messaging application Signal that automatically deleted his messages, the full record of his communications is necessarily lacking. *See* Disarro Decl. ¶ 38 ("I began communicating with Joshua Mast at his request using an application called Signal . . . ."). In any event, the record evidence still shows continued communication between Joshua Mast and PHF.

[43] Jonathan Mast Dep. at 147 (testifying that Joshua was aware in April and May 2023 that he (Jonathan) was in contact with PHF).

[44] Jonathan Mast Dep. at 148 ("I talked with them [PHF] first and then informed Joshua of that.").

together-omitting the key fact that the evidence ultimately demonstrated that Joshua had arranged with both parties ahead of time that Jonathan would serve as the public-facing point of contact for the fundraising campaign.

While Defendants argue that "all the evidence suggests Jonathan Mast was acting on his own initiative and Joshua had no knowledge Jonathan was communicating with [PHF] or what Jonathan would ultimately say or do," Dkt 437 at 12, the Court finds that the record evidence points in precisely the opposite direction. That is, the brothers were working together to achieve the same goal of boosting the Masts' legal defense fund.

Defendants also raise challenges to other elements of civil contempt, [45] including "the existence of a valid decree," and that "the movant suffered harm as a result," as well as other arguments seeking to avoid a contempt sanction. None are persuasive.

First, Defendants dispute the element of "the existence of a valid decree of which the alleged contemnor had actual or constructive knowledge." *Ashcraft,* 218 F.3d at 301. In Defendants' view, the Protective Order is not a "valid decree" because it

[45] There is and can be no real dispute that the second element of civil contempt has been satisfied-"that the decree was in the movant's [i.e., Plaintiffs'] favor," as the Court granted Plaintiffs' motion for a protective order and for leave to proceed using pseudonyms. *See* Dkt. 26; *Ashcraft,* 218 F.3d at 301.

violated the Masts' First Amendment rights-repeating their now-rejected argument that the Protective Order is an unconstitutional "gag order" that failed to satisfy strict scrutiny under the Fourth Circuit's decision in *In re Murphy Brown,* 907 F.3d 788 (4th Cir. 2018); *see* Dkt. 415 at 16-17; Dkt. 437 at 16-17. This argument fails. As explained above, the Protective Order was not a "gag order," and the *James* factors established the governing standard for the Protective Order's issuance. *See supra* at 7-22. The Court has already concluded that the Protective Order satisfied, and continues to satisfy, the *James* factors. *See id.* Further, the Court has determined that even if strict scrutiny applies (and it doesn't), that the Protective Order satisfies that stringent standard. *See supra* at 22 n.12. And the Protective Order was not "reversed," which can render a decree invalid. *See Ashcraft,* 218 F.3d at 302-03. The Court therefore finds that Plaintiffs have demonstrated by clear and convincing evidence that the Protective Order was, and remains, a "valid decree." For substantially the same reasons, Jonathan Mast's mirror arguments that the Protective Order was unconstitutional and violated his First Amendment rights are rejected. *See* Dkt. 437 at 16-17.

<u>Second</u>, Jonathan Mast argues that there is not a valid decree because the Court lacks subject matter jurisdiction. *See* Dkt. 437 at 2-8. The Court has already addressed challenges to the Court's subject matter jurisdiction at length, and concluded that the Court has subject matter jurisdiction namely on account of diversity of citizenship. *See*

MTD Mem. Op. at 26-61.[46] Jonathan Mast argues that one of the original individual defendants, Ahmad Osmani, should be treated as an alien for purposes of the subject matter jurisdiction analysis, and that having aliens as both plaintiffs and defendants defeats diversity jurisdiction. *See* Dkt. 437 at 2-3. The record is clear, however, that Osmani is a United States citizen, as he has represented in the Virginia state court proceedings, *see* Dkt. 267 at 8-9 nn. 3-4, Dkt. 283 at 2465-66 (representation by counsel), and therefore the Court is not confronted with the circumstance Jonathan hypothesizes. Further, Jonathan devotes several pages to his brief addressing the jurisdictional implications of Plaintiffs' inclusion of federal "nominal defendants," apparently without recognizing that they have since been dismissed from the case. Dkt. 270. In any event, as "nominal defendants," they are disregarded for purposes of diversity jurisdiction. *See Hartford Fire Ins. Co. v. Harleysville Mut. Ins. Co.,* 736 F.3d 255, 260 (4th Cir. 2013); *Payne v. Bank of Am., NA.,* No. 3:09-cv-80, 2010 WL 546770, at *4 (W.D. Va. Feb. 11, 2020); *cf Doe v. Mast,* No. 3:22-cv-49, 2023 WL 4492466, at *4 (W.D. Va. July 12, 2023) (recognizing that "no claims have been asserted

[46] To be sure, Jonathan Mast did not have the benefit of the Court's ruling on Defendants' motions to dismiss when he filed this submission contesting Plaintiffs' motion to hold him in civil contempt.

against" them, meaning that they are "nominal" parties in the action).[47]

Third, Defendants argue that Plaintiffs have failed to show by clear and convincing evidence that the "movant suffered harm as a result" of their violations of the Protective Order. *See* Dkt. 415 at 19-20. Defendants appear to have confused the requirement that the movant "suffered harm" with a requirement of "actual harm" or something akin to "tangible" harm. *See* Dkt. 239 at 9. But that is not the law. In similar circumstances, the Fourth Circuit has held that "monetary loss" is not required to constitute "harm," and that "informational harms" can suffice to satisfy the element. *See Klopp,* 957 F.3d at 465---66; *cf Rainbow Sch., Inc. v. Rainbow Early Educ. Holding, LLC,* 887 F .3d 610, 619 (4th Cir. 2018) (holding that trademark confusion and dilution can constitute "harm" to support a contempt order). These and other cases show that Defendants' myopic emphasis on "actual harm" in the context of this case specifically, would make little sense in practice.

Put simply, it beggars belief that the Court would have to wait for *physical harm* to *actually* befall Plaintiffs' families in Afghanistan to impose a contempt sanction for a litigant's failure to abide by the terms of the Protective Order. For the reasons set forth above, the Court has found that the risk of

[47] In view of the Court's opinion addressing subject matter jurisdiction, the Court need not address Jonathan Mast's challenges to federal question jurisdiction. *See* Dkt. 437 at 5-8.

physical harm to Plaintiffs' families is anything but hypothetical or speculative, but rather it is concrete, supported by ample evidence. *See supra* at 11-15. By disclosing information identifying Baby Doe, accessible on the internet everywhere including to those in Afghanistan, Joshua and Jonathan put the safety of Plaintiffs' family members in Afghanistan in jeopardy. They have thus rendered it more likely that Plaintiffs' families will be recognized, and subject to reprisals based on, for example, a mistaken belief that John Doe had worked for the U.S. government. Therefore the Court finds by clear and convincing evidence that Plaintiffs have "suffered harm from the violation" of the Protective Order. *See Ashcraft,* 218 F.3d at 301.

Fourth, Joshua and Jonathan Mast argue that, even if Plaintiffs have established the elements of civil contempt, the Court cannot hold them in contempt because they "took all reasonable steps to comply with the Protective Order." Dkt. 415 at 20-21; Dkt. 437 at 12. The Court finds that Joshua and Jonathan have not met their burden to demonstrate that they "made in good faith all reasonable efforts to comply" with the Protective Order. *See De Simone,* 36 F.4th at 529. Indeed, the weight of persuasive evidence is decidedly to the contrary. Joshua Mast's argument in this regard is that he and Stephanie Mast "did not ask or direct Jonathan Mast to speak to anyone—including [PHF] —on their behalf." Dkt. 415 at 21. And he argues that the Masts did not "provide Jonathan with any of the photos that were provided to PHF." *Id.; see also* Dkt. 437 at 12-13.

These arguments overlook a clear point—Joshua and Jonathan Mast each provided dozens of individual identifying photos of Baby Doe to PHF, either directly emailing them or by sending PHF a link to a Google photo album containing hundreds of such photos. At the time they sent the photos, neither Joshua or Jonathan informed PHF of the Protective Order; sought to get PHF to execute a non-disclosure agreement, as the Protective Order provided; or in any way suggested the photos should be treated with any measure of confidentiality at all—instead, the transmission of Baby Doe's identifying photos to PHF was for use in a public fundraising campaign for the Masts' legal defense. Ironically, the Masts' intended use of Baby Doe's photos on an internet and social media fundraising campaign, as well as on a news broadcast, significantly undermined the Masts' claimed efforts to secure *Baby Doe* a measure of privacy and confidentiality in this litigation, through use of a pseudonym and other measures.[48] Moreover, the Court finds that the weight of the evidence is that Joshua Mast did not even mention the so-called "gag order" to PHF for months after he sent them these photos.[49]

Whatever added insulation in legal liability Joshua and Jonathan Mast thought they were accomplishing by structuring their relationship with

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[48] *See* Dkt. 130 at 14 (agreeing to anonymity for Baby Doe, and stating that "Baby Doe should continue to be protected through the use of her initials").

[49] *See, e.g.,* Disarro Decl. ¶¶ 23-24, 54-55.

PHF in the manner they did, the evidence establishes that Jonathan Mast was serving as Joshua's representative throughout, and regularly apprised him about developments in the fundraising campaign. Nor is the Court persuaded by Jonathan's argument he should be considered to have taken all reasonable efforts to comply, because he requested that PHF remove identifying photos of Baby Doe once "it came to [his] attention that the production of photographs may prove subject to the Court Order." Dkt. 437 at 18. At most, that would support that he gave "some effort" to complying, which is not the relevant inquiry. The Court finds, collectively as well as individually, that Joshua and Jonathan Mast have not met their burden to show that they undertook in good faith all reasonable efforts to comply with the Protective Order.

For these reasons, the Court **finds** that **Plaintiffs have established, by clear and convincing evidence, all elements of civil contempt:** the Protective Order was a valid decree of which Joshua and Jonathan Mast had both actual and constructive knowledge; the Protective Order was a decree in Plaintiffs' favor; Joshua and Jonathan each, by their conduct, violated the terms of the decree and had at least constructive knowledge of such violations; and Plaintiffs suffered harm as a result. The Court further **finds** that Joshua and Jonathan Mast have not established that they took in good faith all reasonable steps to comply with the Protective Order, and as such, are not entitled to the defense from civil contempt.

Accordingly, the Court **finds** Joshua and Jonathan Mast in **civil contempt.**

Plaintiffs have sought from Joshua and Jonathan Mast "the payment of Plaintiffs' attorney's fees related to the prosecution of this motion," as the appropriate sanction for the contumacious conduct. Dkt. 403 at 27. The Court **finds** the payment of reasonable attorney's fees Plaintiffs incurred in connection with the prosecution of this motion to show cause, to be reasonable and appropriate as a remedy for the contempt. *See In re Gen. Motors Corp.,* 61 F.3d 256, 258 (4th Cir. 1995) (explaining that remedies for civil contempt "include ordering the contemnor to reimburse the complainant for losses sustained and for reasonable attorney's fees"); *see also id.* ("remedies and sanctions [for civil contempt] must be remedial and compensatory and, unlike criminal contempt, nonpunitive"). The Court further **finds** that the award of reasonable attorney's fees is a nonpunitive remedy that uses the least possible power necessary to ensure Joshua and Jonathan Mast's compliance with the Protective Order. *See Spallone v. United States,* 493 U.S. 265,275 (1990). The Court will therefore direct Plaintiffs to file a motion for reasonable attorney's fees incurred in connection with the prosecution of this specific motion to show cause, within thirty days of the issuance of this decision.[50] 50

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[50] Defendants will be entitled to respond in the usual course to the motion, should they, for example, wish to contest the amount or scope of such requested fees.

Conclusion

For the aforementioned reasons, the Court has determined, and hereby issues the following **ORDERS,** that:

(1) Defendants' Motions to Amend, Modify, or Vacate the Protective Order will be and hereby are **DENIED.** Dkts. 130, 176, 442.

(2) Plaintiffs' Motion to Show Cause and Supplemental Motion to Show Cause Why Joshua and Stephanie Mast Should Not Be Found in Contempt, with respect to the CBS interview, will be and hereby are **DENIED.** Dkts. 141, 142.

(3) Plaintiffs' Motion to Show Cause Why Joshua and Jonathan Mast Should Not Be Found in Contempt, will be and hereby is **GRANTED,** to the extent set forth above. Dkt. 231.

(4) In view of the Court's decision granting Dkt. 231, Plaintiffs **shall file** any motion for reasonable attorney's fees incurred in connection with the prosecution of that motion, no later than **thirty (30) days** from the issuance of this decision.

It is so **ORDERED.**

The Clerk of Court is directed to send this Memorandum Opinion & Order to the parties.

Entered this 16th day of August, 2024.

/s/ Norman K. Moon

NORMAN K. MOON

SENIOR UNITED STATES
DISTRICT JUDGE

Appendix E

Filed: September 13, 2022

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA CHARLOTTESVILLE DIVISION

Civil Action No. 3:22-CV-49

BABY DOE, A CITIZEN OF AFGHANISTAN CURRENTLY RESIDING IN NORTH CAROLINA, BY AND THROUGH NEXT FRIENDS, JOHN AND JANE DOE; AND JOHN AND JANE DOE, CITIZENS OF AFGHANISTAN AND LEGAL GUARDIANS OF BABY DOE,

Plaintiffs,

v.

JOSHUA MAST, STEPHANIE MAST, RICHARD MAST, KIMBERLEY MOTLEY, AND AHMAD OSMANI,

Defendants,

and

UNITED STATES SECRETARY OF STATE ANTONY BLINKEN AND UNITED STATES SECRETARY OF DEFENSE GENERAL LLOYD AUSTIN, *Nominal Defendants*.

PROTECTIVE ORDER

This matter is before the Court on Plaintiffs' Motion to Proceed by Pseudonym, in which it requests the entry of a protective order governing disclosure of the Plaintiffs' identities and identifying information. Dkt. 3. For the reasons set forth in Plaintiffs' brief in support of their motion, Dkt. 4, as well as incorporated in this Court's order (Dkt. 16), granting Plaintiffs' accompanying motion to seal, the Court **finds** that Plaintiffs have established grounds to proceed by pseudonym and for entry of the following terms of a protective order. *See James v. Jacobson,* 6 F.3d 233, 238 (4th Cir. 1993); *see also United States v. Doe,* 962 F.3d 139, 147 (4th Cir. 2020). Because the Court **finds** that Plaintiffs have demonstrated that disclosure of Plaintiffs' identities and identifying information would pose a substantial risk to the physical safety of Plaintiffs and other innocent non-parties, in view of the age of minor Plaintiff Baby Doe, and concluding that any risk of prejudice or unfairness (if any should exist), is more than sufficiently mitigated by the measured steps requested by Plaintiffs' counsel below which are tailored to protect such safety interests, in order to ensure Plaintiffs' safety and the safety of other innocent non-parties, this Court **ORDERS** as follows:

1. The Defendants and their counsel and representatives are prohibited from disclosing any information that directly or indirectly identifies Plaintiffs or their family members to any person, including but not limited to the Plaintiffs' names and the locations of their residences abroad and places of birth, unless that person first executes a non-disclosure agreement enforceable through the contempt sanction. This applies to any disclosure in the course of any investigation undertaken by the Defendants, their counsel, or their other agents or representatives.

2. All papers filed with this Court or disseminated to any person who has not executed a non-disclosure agreement enforceable through the contempt sanction shall use the "John Doe", "Jane Doe", or "Baby Doe" pseudonyms to refer to the Plaintiffs.

3. Any papers that identify any Plaintiff either directly or indirectly shall be filed under seal, with redacted copies placed in the public files.

4. Defendants shall disclose to Plaintiffs' counsel any person to whom Defendants, their counsel or representatives, have disclosed Plaintiffs' identities, and shall provide Plaintiffs with copies of the executed non-disclosure agreements required by this Order.

5. The parties shall be permitted to notice depositions and depose witnesses and conduct other discovery using the "John Doe", "Jane Doe", and "Baby Doe" pseudonyms. In deposing any witnesses

who are unacquainted with the Plaintiffs, the Doe pseudonyms shall be used. In deposing any witnesses already acquainted with the Plaintiffs, actual names may be used, but the Doe pseudonyms must be used in any transcript of those depositions.

Accordingly, Plaintiffs' motion for leave to proceed under a pseudonym and for entry of the protective order will be and hereby is **GRANTED.** Dkt. 3.

It is so **ORDERED.**

The Clerk of Court shall send a certified copy of this Order to all counsel of record. Plaintiffs shall be responsible for providing a copy of this Order to Defendants forthwith, who have not yet entered an appearance in the case.

/s/ Norman K. Moon

NORMAN K. MOON

SENIOR UNITED STATES DISTRICT JUDGE