

No. 18-12081

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

NATIONAL RIFLE ASSOCIATION,
Plaintiff-Appellant,

JANE DOE and JOHN DOE
Movants-Appellants,

v.

ATTORNEY GENERAL, STATE OF FLORIDA, and COMMISSIONER,
OFFICIAL CAPACITY, FLORIDA DEPARTMENT OF LAW
ENFORCEMENT,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Florida
Case No. 1:18-cv-137-MW-CAS (Hon. Mark E. Walker)

**BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS AND 21 MEDIA ORGANIZATIONS
IN SUPPORT OF DEFENDANTS-APPELLEES**

Bruce D. Brown, Esq.
Counsel of Record
Katie Townsend, Esq.*
Caitlin Vogus, Esq.*
Jennifer A. Nelson, Esq.*
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1250
Washington, D.C. 20005
Tel: (202) 795-9300
Facsimile: (202) 795-9310
**Of counsel*

CORPORATE DISCLOSURE STATEMENT

The parties to this *amicus* brief are: The Reporters Committee for Freedom of the Press, American Society of News Editors, Associated Press Media Editors, Association of Alternative Newsmedia, California News Publishers Association, The Center for Investigative Reporting, Courthouse News Service, The Dallas Morning News, The E.W. Scripps Company, First Look Media Works, Inc., International Documentary Assn., Investigative Reporting Program, Investigative Reporting Workshop at American University, The McClatchy Company, The Media Institute, MPA – The Association of Magazine Media, National Press Photographers Association, POLITICO LLC, The Seattle Times Company, Society of Professional Journalists, Tully Center for Free Speech, and WPLG-TV.

Pursuant to Fed. R. App. P. 26.1, *amici* disclose as follows:

The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

American Society of News Editors is a private, non-stock corporation that has no parent.

The Associated Press Media Editors has no parent corporation and does not issue any stock.

Association of Alternative Newsmedia has no parent corporation and does not issue any stock.

California News Publishers Association is a mutual benefit corporation organized under state law for the purpose of promoting and preserving the newspaper industry in California.

The Center for Investigative Reporting is a California non-profit public benefit corporation that is tax-exempt under section 501(c)(3) of the Internal Revenue Code. It has no statutory members and no stock.

Courthouse News Service is a privately held corporation with no parent corporation and no publicly held corporation holds more than 10 percent of its stock.

The Dallas Morning News, Inc. is owned by A. H. Belo Corporation.

The E.W. Scripps Company is a publicly traded company with no parent company. No individual stockholder owns more than 10% of its stock.

First Look Media Works, Inc. is a non-profit non-stock corporation organized under the laws of Delaware. No publicly-held corporation holds an interest of 10% or more in First Look Media Works, Inc.

The International Documentary Association is an not-for-profit organization with no parent corporation and no stock.

The Investigative Reporting Program is a project of the University of California, Berkeley. It issues no stock.

The Investigative Reporting Workshop is a privately funded, nonprofit news organization affiliated with the American University School of Communication in Washington. It issues no stock.

The McClatchy Company is publicly traded on the New York Stock Exchange American under the ticker symbol MNI. Chatham Asset Management, LLC and Royce & Associates, LP both own 10% or more of the common stock of The McClatchy Company.

The Media Institute is a 501(c)(3) non-stock corporation with no parent corporation.

MPA – The Association of Magazine Media has no parent companies, and no publicly held company owns more than 10% of its stock.

National Press Photographers Association is a 501(c)(6) nonprofit organization with no parent company. It issues no stock and does not own any of the party's or amicus' stock.

POLITICO LLC is a wholly owned subsidiary of privately held Capitol News Company, LLC.

The Seattle Times Company: The McClatchy Company owns 49.5% of the voting common stock and 70.6% of the nonvoting common stock of The Seattle Times Company.

Society of Professional Journalists is a non-stock corporation with no parent company.

The Tully Center for Free Speech is a subsidiary of Syracuse University.

WPLG, Inc. is owned by BH Holding LLC which is owned by Berkshire Hathaway Credit Corporation which is owned by Berkshire Hathaway Inc. which is a publicly held corporation.

Counsel certifies that, in addition to those people and entities already identified in the appellants' and appellees' Certificate of Interested Persons, these people and entities have an interest in the outcome of this case:

1. Kevin Goldberg (Counsel for *Amici Curiae* American Society of News Editors and Association of Alternative Newsmedia)
2. James Ewert and Nikki Moore (Counsel for *Amicus Curiae* California News Publishers Association)
3. D. Victoria Baranetsky (Counsel for *Amicus Curiae* The Center for Investigative Reporting)
4. Rachel Matteo-Boehm (Counsel for *Amicus Curiae* Courthouse News Service)
5. Chris Larkin (Counsel for *Amicus Curiae* The Dallas Morning News)
6. David M. Giles (Counsel for *Amicus Curiae* The E.W. Scripps Company)

7. David Bralow (Counsel for *Amicus Curiae* First Look Media Works, Inc.)
8. Juan Cornejo (Counsel for *Amicus Curiae* The McClatchy Company)
9. Kurt Wimmer (Counsel for *Amicus Curiae* The Media Institute)
10. James Cregan (Counsel for *Amicus Curiae* MPA – The Association of Magazine Media)
11. Mickey H. Osterreicher (Counsel for *Amicus Curiae* National Press Photographers Association)
12. Elizabeth C. Koch (Counsel for *Amicus Curiae* POLITICO LLC)
13. Bruce E.H. Johnson (Counsel for *Amicus Curiae* The Seattle Times Co.)
14. Bruce W. Sanford & Mark I. Bailen (Counsel for *Amicus Curiae* Society of Professional Journalists)

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE* 1

SOURCE OF AUTHORITY TO FILE..... 3

FED. R. APP. P. 29(a)(4)(E) STATEMENT 4

SUMMARY OF ARGUMENT 5

ARGUMENT 7

 I. Openness and transparency are bedrock principles of our judicial system. ... 7

 II. Permitting pseudonymous plaintiffs impinges the public’s First Amendment and common law rights of access to court proceedings. 8

 A. Courts in this Circuit and throughout the country recognize that allowing plaintiffs to proceed using pseudonyms is disfavored. 8

 B. The use of pseudonyms may lead to additional, significant restrictions on the public’s presumptive right of access to civil proceedings and documents. 11

 III. Plaintiffs-Appellants have failed to overcome the “strong presumption” of openness in judicial proceedings. 14

 A. Does have not shown an actual risk to any substantial privacy right..... 14

 B. Cases concerning Second Amendment rights and other controversial issues have routinely proceeded with named plaintiffs..... 16

CONCLUSION..... 20

CERTIFICATE OF COMPLIANCE..... 21

APPENDIX A..... 22

APPENDIX B..... 29

CERTIFICATE OF SERVICE 31

TABLE OF AUTHORITIES

CASES

Am. Charities for Reasonable Fundraising Reg., Inc. v. Pinellas County, 221 F.3d 1211 (11th Cir. 2000) 13

Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981)..... 9

Brown & Williamson Tobacco Corp. v. Federal Trade Comm’n, 710 F.2d 1165 (6th Cir. 1983) 8

Craig v. Harney, 331 U.S. 367 (1947)..... 7

District of Columbia v. Heller, 554 U.S. 570 (2008)..... 17

Doe No. 1 v. Reed, 561 U.S. 186 (2010)..... 19

Doe v. Blue Cross & Blue Shield United, 112 F.3d 869 (7th Cir. 1997)..... 9, 10

Doe v. Frank, 951 F.2d 320 (11th Cir. 1992) 8, 9, 10, 14, 17

Doe v. Stegall, 653 F.2d 180 (5th Cir. Unit A, Aug. 1981) 9, 12, 14

Doe v. Village of Deerfield, 819 F.3d 372 (7th Cir. 2016) 10

Does I Thru XXIII v. Advanced Textile Corp., 214 F.3d 1058 (9th Cir. 2000)..... 10

Ezell v. City of Chicago, 846 F.3d 888 (7th Cir. 2017) 17

Femedeer v. Haun, 227 F.3d 1244 (10th Cir. 2000)..... 15

Fla. Action Comm., Inc. v. Seminole Cty., No. 6:15-1525, 2016 WL 6080988 (M.D. Fla. Oct. 18, 2016) 15

Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) 8

Harris v. Mexican Specialty Foods, Inc., 564 F.3d 1301 (11th Cir. 2009) 13

Horsley v. Trame, 808 F.3d 1126 (7th Cir. 2015)..... 17

In re Oliver, 333 U.S. 257 (1948)..... 8

M.M. v. Zavaras, 139 F.3d 798 (10th Cir. 1998)..... 10

Methodist Univ. Ass’n of Women Law Students v. Wynne & Jaffe, 599 F.2d 707 (5th Cir. 1979) 10

Newman v. Graddick, 696 F.2d 796 (11th Cir. 1983)..... 9

Nixon v. Warner Commc’ns, Inc., 435 U.S. 589 (1978) 7

NRA v. BATFE, 700 F.3d 185 (5th Cir. 2012) 16

Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010)..... 18

Plaintiff B v. Francis, 631 F.3d 1310 (11th Cir. 2011)..... 9, 10
Powell v. Tompkins, 926 F. Supp. 2d 367 (D. Mass. 2013)..... 17
Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984)..... 8
Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)..... 7
Roe v. Aware Woman Ctr. for Choice, 253 F.3d 678 (11th Cir. 2001) 10
Siegel v. LePore, 234 F.3d 1163 (11th Cir. 2000)..... 13

OTHER AUTHORITIES

Josh Horwitz, *Dick Heller: In his own words*,
The Huffington Post, Oct. 24, 2008 17
Pew Research Center, *A Contentious Debate: Same-Sex Marriage in the U.S.*,
July 9, 2009 18
The N.R.A. Lobbyist Behind Florida’s Pro-Gun Policies,
The New Yorker, March 5, 2018 15
WNYC Studios - More Perfect, *Gun Show*, Oct. 12, 2017..... 18

STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae are the Reporters Committee for Freedom of the Press, American Society of News Editors, Associated Press Media Editors, Association of Alternative Newsmedia, California News Publishers Association, The Center for Investigative Reporting, Courthouse News Service, The Dallas Morning News, The E.W. Scripps Company, First Look Media Works, Inc., International Documentary Assn., Investigative Reporting Program, Investigative Reporting Workshop at American University, The McClatchy Company, The Media Institute, MPA – The Association of Magazine Media, National Press Photographers Association, POLITICO LLC, The Seattle Times Company, Society of Professional Journalists, Tully Center for Free Speech, and WPLG-TV. A supplemental statement of identity and interest of *amici curiae* is included below as Appendix A.

Amici file this brief in support of Defendants-Appellees Attorney General, State of Florida and Commissioner, Official Capacity, Florida Department of Law Enforcement. *Amici* urge the Court to affirm the district court’s denial of Plaintiffs-Appellants’ request to allow the two individual plaintiffs to proceed pseudonymously. This case, which concerns a challenge to a Florida gun control statute, is of legitimate interest to the news media and the public. Permitting the two individual plaintiffs to proceed using pseudonyms would hinder the ability of

the press to report on this case not only by obscuring the plaintiffs' identities, but also because maintaining their anonymity is likely to require redaction or sealing of filings and/or courtroom closures, contrary to the presumptions of public access guaranteed by both the First Amendment and common law. Open judicial proceedings serve the interests of the public, and enable members of the news media to report fully and accurately on matters pending in federal courts. *Amici* write to emphasize how the First Amendment and common law presumptive rights of access to civil proceedings and court documents are implicated when parties in federal lawsuits are permitted to proceed under pseudonyms.

SOURCE OF AUTHORITY TO FILE

Counsel for Plaintiffs-Appellants and Defendants-Appellees have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

FED. R. APP. P. 29(a)(4)(E) STATEMENT

Amici state that:

1. no party's counsel authored the brief in whole or in part;
2. no party or party's counsel contributed money intended to fund preparing or submitting the brief; and
3. no person, other than *amici*, their members or their counsel, contributed money intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

This case presents a critical question: whether civil litigants challenging the constitutionality of a state statute may do so anonymously because they allege, without proof, that the controversial nature of their lawsuit will subject them to harassment, intimidation, or threats. As Plaintiffs-Appellants acknowledge in their Statement Regarding Oral Argument, this Court’s holding “will have far reaching effects, since it will govern the ability [of parties] to proceed under pseudonyms in many different kinds of significant litigation.”

Permitting plaintiffs John and Jane Doe (collectively, “Does”) to litigate this matter anonymously will hinder the news media’s ability to accurately inform the public about judicial proceedings in a matter of substantial public interest and concern. Our nation’s long tradition of open judicial proceedings ensures public accountability for judges and litigants, enhances public trust in the judicial process, and supports more accurate fact-finding. Access to civil records and proceedings is necessary for journalists to gather information and to report accurately on legal disputes that could have broad ramifications for the public. Pseudonymity is a form of court closure; it withholds from the public valuable information about pending litigation: the names of the parties themselves.

In addition, allowing the individual plaintiffs in this case to proceed pseudonymously is likely to lead to additional restrictions on public access to court

filings and proceedings. Plaintiffs-Appellants assert, among other things, facial and as-applied Second Amendment and Equal Protection challenges to recently-enacted state legislation regulating the sale of firearms in Florida. Given the as-applied nature of these challenges, it is highly likely that judicial documents and court hearings will include information pertaining to Does. If Does are permitted to proceed pseudonymously, they may also ask the district court to seal documents and/or close the courtroom to protect their identities during this litigation, causing journalists and members of the public to lose access to valuable information about the judicial proceedings and records in this case.

Amici recognize that a district court may, in exceptional cases, permit a plaintiff to proceed with his or her case pseudonymously. Here, however, the district court appropriately held that Does failed to identify *any* “substantial privacy right” or “information of the utmost intimacy” that would be protected by allowing them to proceed using pseudonyms. Indeed, permitting Does to proceed anonymously would set a dangerous precedent by which plaintiffs could litigate pseudonymously merely by asserting that their case involved issues of a “highly controversial nature.” Such a low bar for anonymity would be unprecedented and wholly at odds with the constitutional right of public access to court proceedings that has been repeatedly reaffirmed by the Supreme Court. *Amici* respectfully urge this Court to affirm the district court’s decision below.

ARGUMENT

I. Openness and transparency are bedrock principles of our judicial system.

Public proceedings are “one of the essential qualities of a court of justice.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 567 (1980) (quoting *Daubney v. Cooper*, 109 Eng. Rep. 438, 441 (K.B. 1829)); *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598–99 (1978). Throughout the history of the United States, civil trials have traditionally been open to the public. *See Richmond Newspapers*, 448 U.S. at 580 n.17. As the Supreme Court has stated:

[A] trial is a public event. What transpires in the court room is public property. There is no special prerequisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.”

Craig v. Harney, 331 U.S. 367, 374 (1947).

The public right of access to judicial proceedings is a necessary corollary to the right to discuss government affairs, and the Supreme Court has long recognized the essential role that the press plays in gathering and disseminating information to the public. *Richmond Newspapers, Inc.*, 448 U.S. at 573 (noting that the news media acts as “surrogates for the public” in reporting on judicial proceedings). By ensuring public access to the courts and enabling public discussion of the functioning of the judiciary, the news media help “the public to participate in and serve as a check upon the judicial process—an essential component in our structure

of self-government.” *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982); *see also In re Oliver*, 333 U.S. 257, 271 (1948) (“Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.”). In addition, as many courts have recognized, access to proceedings allows the public to “analyze and critique the reasoning of the court.” *Brown & Williamson Tobacco Corp. v. Federal Trade Comm’n*, 710 F.2d 1165, 1178 (6th Cir. 1983). Thus, “[o]penness ... enhances both the basic fairness of [a] trial and the appearance of fairness so essential to public confidence in the system.” *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984).

II. Permitting pseudonymous plaintiffs impinges the public’s First Amendment and common law rights of access to court proceedings.

A. Courts in this Circuit and throughout the country recognize that allowing plaintiffs to proceed using pseudonyms is disfavored.

Rule 10(a) of the Federal Rules of Civil Procedure requires parties to a lawsuit to identify themselves in their respective pleadings. Fed. R. Civ. P. 10(a); *Doe v. Frank*, 951 F.2d 320, 322 (11th Cir. 1992) (per curiam). Though seemingly routine, Rule 10(a) serves the critical purpose of facilitating public scrutiny of judicial proceedings by “protect[ing] the public’s legitimate interest in knowing all of the facts involved, including the identities of the parties.” *Frank*, 951 F.2d at 322. Access to the names of the parties is therefore “more than a customary procedural formality; First Amendment guarantees are implicated when a court

decides to restrict public scrutiny of judicial proceedings.” *Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. Unit A, Aug. 1981).¹ “Identifying the parties to the proceeding is an important dimension of publicness. The people have a right to know who is using their courts.” *Doe v. Blue Cross & Blue Shield United of Wisc.*, 112 F.3d 869, 872 (7th Cir. 1997); *see also Newman v. Graddick*, 696 F.2d 796, 801 (11th Cir. 1983) (“[O]pen proceedings may be imperative if the public is to learn about the crucial legal issues that help shape modern society. Informed public opinion is critical to effective self-governance.”).

Recognizing the importance of the public’s knowledge of parties’ identities, the Eleventh Circuit has held that a plaintiff may proceed anonymously only in “exceptional cases” where the plaintiff has a “substantial privacy right which outweighs the ‘customary and constitutionally-embedded presumption of openness in judicial proceedings.’” *Frank*, 951 F.2d at 323–24 (quoting *Stegall*, 653 F.2d at 186); *see also Plaintiff B v. Francis*, 631 F.3d 1310, 1315 (11th Cir. 2011) (recognizing a “strong presumption in favor of parties’ proceeding in their own names.”). The rare cases in which plaintiffs are allowed to proceed pseudonymously typically “involve[] ... matters of a sensitive and highly personal

¹ In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), the Eleventh Circuit adopted as precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

nature, such as birth control, abortion, homosexuality or the welfare rights of illegitimate children or abandoned families[.]” *S. Methodist Univ. Ass’n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707, 712–13 (5th Cir. 1979) (internal citations omitted); *see also Francis*, 631 F.3d at 1316; *Roe v. Aware Woman Ctr. for Choice*, 253 F.3d 678, 685 (11th Cir. 2001). The risk that a plaintiff may suffer from embarrassment or criticism “is not enough.” *Frank*, 951 F.2d at 324.

Other federal appellate courts considering the issue have recognized that the ability of a party to proceed anonymously is strongly disfavored because the veil it casts over the court “runs afoul of the public’s common law right of access to judicial proceedings.” *Does I Thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1067 (9th Cir. 2000); *see also Doe v. Village of Deerfield*, 819 F.3d 372, 376–77 (7th Cir. 2016) (stating that the public has a right to know the names of litigants who take up time, space, and money in the court system that the public is paying for); *M.M. v. Zavaras*, 139 F.3d 798, 800 (10th Cir. 1998) (noting that the court system is inherently public because it exists to serve the needs of the public and that a secretive judicial system is not in harmony with the existence of a free society); *Blue Shield United of Wisc.*, 112 F.3d at 872 (holding that granting anonymity to litigants is actively “disfavored”).

In short, court proceedings are open by default, and those seeking to pursue claims pseudonymously must justify any departure from that presumption of

openness, which, as detailed below, *infra* Section III.A, Plaintiffs-Appellants have failed to do. The benefits of an open and transparent court system—guarding against the miscarriage of justice, assuring that proceedings are fair, discouraging perjury and decisions based on bias, and providing important context—are undermined when the public and the press cannot tell who has invoked the power of courts to resolve disputes. Withholding litigants’ names denies the public access to critical information, thereby inhibiting its ability to scrutinize the judicial process.

- B. The use of pseudonyms may lead to additional, significant restrictions on the public’s presumptive right of access to civil proceedings and documents.

Plaintiffs-Appellants assert that “whether or not Jane and John Doe remain anonymous, the public will still be able to access the public filings in the case, read and assess the competing legal and factual arguments that the parties bring to bear, and stay abreast of all meaningful, public developments in the case.” Brief of Plaintiffs-Appellants (hereinafter “App. Br.”) at 30. Yet this argument ignores the consequences of granting pseudonymity to Does. If Does are permitted to proceed pseudonymously, the district court may have to take further steps to preserve their anonymity that would inhibit the public’s presumptive right of access to court proceedings and records.

To the extent the “factual arguments that the parties bring to bear” contain information about Does that could reveal their identities, allowing Does to proceed pseudonymously may require the district court to redact or seal that information from public view in order to preserve Does’ anonymity. The district court may even find itself cornered into closing *all* proceedings attended by Does, *all* proceedings at which they testify, or *all* proceedings at which *others* testify about them, lest members of the public recognize Does by sight or piece together their identities through the substance and context of testimony and evidence introduced at trial.² Such attendant sealing and closure would substantially impair the public’s First Amendment and common law rights of access to judicial proceedings and records in this case. *Stegall*, 653 F.2d at 186.

The assertion of Plaintiffs-Appellants that the claims pertaining to Does—and indeed, even the as-applied challenge on behalf of Jane Doe—“is almost certain to turn on legislative facts concerning the justification for the ban, not adjudicative facts pertaining to Jane Doe’s specific identity and activities,” App. Br. at 30, is both highly speculative and likely inaccurate. This Court has

² The Supreme Court has afforded the press wide latitude to report the identity of litigants obtained through public proceedings, public records, or other lawful means, and has struck down efforts to restrain, or punish, the press from doing so. *See, e.g., The Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989) (“[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.”) (citations omitted).

repeatedly held that “[b]ecause [an as-applied] challenge asserts that a statute cannot be constitutionally applied in particular circumstances, it necessarily requires the development of a factual record for the court to consider.” *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1308 (11th Cir. 2009) (citing *Siegel v. LePore*, 234 F.3d 1163, 1171 (11th Cir. 2000)); see also *Am. Charities for Reasonable Fundraising Reg., Inc. v. Pinellas County*, 221 F.3d 1211, 1214 (11th Cir. 2000) (“To establish their standing to bring an as-applied challenge [in the context of a pre-enforcement challenge], [p]laintiffs need to demonstrate that a ‘credible threat of an injury exists,’ not just a speculative threat which would be insufficient for Article III purposes.”) (citations omitted).

Plaintiffs-Appellants’ allegations in this case are—as they themselves argue—significant matters of public concern, especially because their challenges are framed as an assertion of their constitutional rights, and seek ultimately to invalidate legislation. The testimony by and concerning Does could very well affect the ultimate outcome of this case. Open litigation, with full disclosure of the parties’ identities, will allow the public to better understand and assess the parties’ competing claims, and their credibility, and to make informed judgments about the administration of justice in this case.

III. Plaintiffs-Appellants have failed to overcome the “strong presumption” of openness in judicial proceedings.

In its order, the district court held that Plaintiffs-Appellants did not overcome the strong presumption in favor of parties proceeding in their own names because Does failed to establish “a substantial privacy right which outweighs the ‘customary and constitutionally-embedded presumption of openness in judicial proceedings.’” *Frank*, 951 F.2d at 323 (quoting *Stegall*, 653 F.2d at 186). That ruling should not be disturbed on appeal.

A. Does have not shown an actual risk to any substantial privacy right.

Even assuming that a risk of harassment, intimidation, or threats would be sufficient to justify permitting a plaintiff to proceed with litigation anonymously, the affidavits submitted by Does provide no evidence that such a risk is present here; instead, they state only that they fear the *potential* harassment and *potential* threats of violence that might occur given that their lawsuit is of a “controversial” nature.³ Appendix 34–37.

³ Plaintiffs-Appellants assert that the district court “erred in concluding that it lacked discretion to grant leave to proceed pseudonymously based on reasonable fears of harassment, intimidation, and threats of violence.” App. Br. at 32. *Amici* concur with Defendants-Appellees’ argument that the district court exercised its discretion to consider such circumstances and appropriately held that Plaintiffs-Appellants failed to prove that Does will face a significant threat of physical harm if they do not proceed under pseudonyms. Brief of Defendants-Appellees at 23–28.

Indeed, Does have failed to produce any evidence beyond “generalities and speculation” that indicates “that the Does *themselves* face[] [a] threat of violence” if they proceed under their real names. *Fla. Action Comm., Inc. v. Seminole Cty.*, No. 6:15-1525, 2016 WL 6080988, at *3 (M.D. Fla. Oct. 18, 2016) (emphasis in original); *see also Femedeer v. Haun*, 227 F.3d 1244, 1246 (10th Cir. 2000) (denying party’s request to proceed anonymously where the party did not demonstrate “real, imminent personal danger”). Instead, Plaintiffs-Appellants rely almost entirely on a single affidavit submitted by Marion Hammer, a former president of the National Rifle Association (“NRA”) now working as a lobbyist for the organization, who gave examples of the “offensive and threatening emails and phone calls” she has received during her tenure. Appendix 38–40; App. Br. at 8.

Plaintiffs-Appellants’ reliance on Ms. Hammer’s affidavit, however, is misplaced; her high-profile, longstanding position with the NRA puts her in a significantly different position than Does. *See* Mike Spies, *The N.R.A. Lobbyist Behind Florida’s Pro-Gun Policies*, *The New Yorker*, March 5, 2018, *available at* <https://bit.ly/2ohTIIj> (describing Ms. Hammer as “the most influential gun lobbyist in the United States,” with “unique influence over legislators” that has “dramatically alter[ed] long-held American norms.”). As such, any attempt to use evidence that Ms. Hammer has been subject to “harassment and threats,” App. Br. at 26, as proof that John and Jane Doe, two private adults, would face similar

consequences for proceeding publicly with their discrete challenge to Florida’s gun reform legislation is an unwarranted logical leap. Put simply, the record before this Court is devoid of *any* factual basis on which to conclude that there would be a legitimate risk of retaliation against Does themselves if their identities were revealed in this litigation. Permitting Does to proceed pseudonymously in this case would provide grounds for *any* plaintiff asserting a “controversial” claim to do so. Such broad use of pseudonymity is impermissible.

B. Cases concerning Second Amendment rights and other controversial issues have routinely proceeded with named plaintiffs.

In support of their argument that Does should be permitted to proceed pseudonymously, Plaintiffs-Appellants assert that “it is difficult to think of a topic as controversial and contentious as Second Amendment rights.” App. Br. at 22. However, debate over the scope of constitutional rights is often subject to controversy, and federal courts regularly handle such matters. In the vast majority of these cases, including cases concerning the Second Amendment, the plaintiffs file the lawsuit under their own names. A finding that the self-described “controversial and contentious” nature of Plaintiffs-Appellants’ lawsuit is a valid reason to permit Does to proceed using pseudonyms would subject courts nationwide to a flood of requests for pseudonymity in a wide variety of contexts.

Amici are unaware of any plaintiffs similarly-situated to Does (*i.e.* a plaintiff asserting a Second Amendment challenge to state gun reform legislation) who have

ever shown that they were subject to the “real danger of physical harm” required to proceed pseudonymously. *Frank*, 951 F.2d at 324. Further, as detailed by Defendants-Appellees, litigants similarly-situated to Does have repeatedly brought Second Amendment challenges similar to those raised here without the use of pseudonyms. *See, e.g., NRA v. BATFE*, 700 F.3d 185 (5th Cir. 2012); *Powell v. Tompkins*, 926 F. Supp. 2d 367 (D. Mass. 2013); *Horsley v. Trame*, 808 F.3d 1126 (7th Cir. 2015); *Ezell v. City of Chicago*, 846 F.3d 888 (7th Cir. 2017).

In arguably the most famous Second Amendment challenge of the last decade, a licensed special police officer for the District of Columbia named Dick Heller served as the named plaintiff in a successful challenge to a Washington, D.C. law banning handguns and requiring other firearms to be stored unloaded or locked. *See District of Columbia v. Heller*, 554 U.S. 570 (2008). Though the case itself received broad media coverage, Mr. Heller himself was not a focus of media attention; indeed, according to news reports following the Supreme Court’s 2008 decision, “very little ha[d] been written [] about the plaintiff [Mr. Heller] in the case.” Josh Horwitz, *Dick Heller: In his own words*, The Huffington Post, Oct. 24, 2008, available at <https://perma.cc/MUV5-H5TA>. Mr. Heller today remains an advocate for the Second Amendment and is active in challenging gun reform legislation nationwide. *See Heller Foundation*, <http://www.hellerfoundation.org>; *see also C-SPAN*, Feb. 24, 2018, available at [17](https://www.c-</p></div><div data-bbox=)

span.org/video/?441468-3/dick-heller-speaks-cpac (speaking at the 2018 Conservative Political Action Conference); WNYC Studios - More Perfect, *Gun Show*, Oct. 12, 2017, available at <https://www.wnycstudios.org/story/gun-show> (interviewed as a “key voice” in gun rights advocacy).

Nor is proceeding with constitutional challenges as a named plaintiff unique to claims brought pursuant to the Second Amendment. Much like the gun reform debate taking place today, the permissibility of same-sex marriage in America was described in 2009 as “a contentious debate” which had “grown from an issue that occasionally arose in a few states to a nationwide controversy.” Pew Research Center, *A Contentious Debate: Same-Sex Marriage in the U.S.*, July 9, 2009, available at <http://www.pewforum.org/2009/07/09/a-contentious-debate-same-sex-marriage-in-the-us>. In 2009, two couples who wanted to marry—Kris Perry & Sandy Stier and Paul Katami & Jeff Zarrillo—famously challenged a California constitutional amendment (known as Proposition 8) banning marriage for gay and lesbian couples, arguing that the state constitutional amendment violated the Due Process and Equal Protection Clauses and thus infringed upon their constitutional rights. These four individuals not only proceeded using their names but also testified publicly at trial. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 932 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), and *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) (“All four

plaintiffs testified that they wished to marry their partners, and all four gave similar reasons.”). None sought to proceed pseudonymously.

Though Plaintiffs-Appellants allege that the controversial political nature of this case cuts in favor of permitting anonymity for Does, that simply cannot be the case; instead, the nature and political implications of this litigation highlight precisely why full public access to the proceedings, including the names of the parties, is critical. Does seek to invalidate state legislation aimed at addressing an issue at the forefront of the national consciousness on the grounds that it is unconstitutional; citizens of Florida who are engaged in an active political debate around this issue, as well as the media covering the debate, should be able to observe all aspects of how the court system handles this case. As Justice Scalia observed in *Doe v. Reed*, in which the Supreme Court held that referendum signatories’ First Amendment rights were not violated by the disclosure of their names, public scrutiny of those who participate in the democratic process is essential. *See Doe No. 1 v. Reed*, 561 U.S. 186, 228 (2010) (Scalia, J., concurring). In response to the signatories’ concerns that disclosure of their names could lead to harsh criticism from political opponents, Justice Scalia noted that “[t]here are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance.” *Id.*

“Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.” *Id.*

CONCLUSION

For the foregoing reasons, as well as those set forth in Appellees’ responding brief, this Court should affirm the order of the district court denying Movants-Appellants’ motion to proceed under pseudonyms.

Dated: September 28, 2018

Respectfully submitted,

/s/ Bruce D. Brown

Bruce D. Brown

Counsel of Record

Katie Townsend*

Caitlin Vogus*

Jennifer A. Nelson*

THE REPORTERS COMMITTEE FOR

FREEDOM OF THE PRESS

1156 15th Street NW, Suite 1250

Washington, DC 20005

bbrown@rcfp.org

(202) 795-9300

**Of counsel*

**Additional counsel for *amici* are listed in Appendix B.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief of *amici curiae*:

- 1) Complies with the type-volume limitation Fed. R. App. P. 29(a)(5) because it contains 3,621 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as calculated by the word-processing system used to prepare the brief; and
- 2) Complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14-point Times New Roman.

/s/ Bruce D. Brown

Bruce D. Brown, Esq.

Counsel of Record

THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS

Dated: September 28, 2018
Washington, DC

APPENDIX A

SUPPLEMENTAL STATEMENT OF IDENTITY OF *AMICI CURIAE*

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

With some 500 members, **American Society of News Editors** (“ASNE”) is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

The Associated Press Media Editors is a nonprofit, tax-exempt organization of newsroom leaders and journalism educators that works closely with The Associated Press to promote journalism excellence. APME advances the

principles and practices of responsible journalism; supports and mentors a diverse network of current and emerging newsroom leaders; and champions the First Amendment and promotes freedom of information.

Association of Alternative Newsmedia (“AAN”) is a not-for-profit trade association for 130 alternative newspapers in North America, including weekly papers like The Village Voice and Washington City Paper. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

The California News Publishers Association (“CNPA”) is a nonprofit trade association representing the interests of over 1300 daily, weekly and student newspapers and news websites throughout California.

The Center for Investigative Reporting (CIR), founded in 1977, is the nation’s first nonprofit investigative journalism organization. CIR produces investigative journalism for its <https://www.revealnews.org/> website, the Reveal national public radio show and podcast, and various documentary projects - often in collaboration with other newsrooms across the country.

Courthouse News Service is a California-based legal news service for lawyers and the news media that focuses on court coverage throughout the nation,

reporting on matters raised in trial courts and courts of appeal up to and including the U.S. Supreme Court.

A. H. Belo Corporation is a leading local news and information publishing company with commercial printing, distribution and direct mail capabilities, as well as expertise in emerging media and digital marketing. A. H. Belo Corporation publishes **The Dallas Morning News** (www.dallasnews.com), Texas' leading newspaper and winner of nine Pulitzer Prizes, and various niche publications targeting specific audiences.

The E.W. Scripps Company serves audiences and businesses through television, radio and digital media brands, with 33 television stations in 24 markets. Scripps also owns 33 radio stations in eight markets, as well as local and national digital journalism and information businesses, including mobile video news service Newsy and weather app developer WeatherSphere. Scripps owns and operates an award-winning investigative reporting newsroom in Washington, D.C. and serves as the long-time steward of the nation's largest, most successful and longest-running educational program, the Scripps National Spelling Bee.

First Look Media Works, Inc. is a new non-profit digital media venture that produces The Intercept, a digital magazine focused on national security reporting.

The International Documentary Association (IDA) is dedicated to building and serving the needs of a thriving documentary culture. Through its programs, the IDA provides resources, creates community, and defends rights and freedoms for documentary artists, activists, and journalists.

The Investigative Reporting Program (IRP) at UC Berkeley's Graduate School of Journalism is dedicated to promoting and protecting the practice of investigative reporting. Evolving from a single seminar, the IRP now encompasses a nonprofit newsroom, a seminar for undergraduate reporters and a post-graduate fellowship program, among other initiatives. Through its various projects, students have opportunities to gain mentorship and practical experience in breaking major stories for some of the nation's foremost print and broadcast outlets. The IRP also works closely with students to develop and publish their own investigative pieces. The IRP's work has appeared on PBS Frontline, Univision, Frontline/WORLD, NPR and PBS NewsHour and in publications such as Mother Jones, The New York Times, Los Angeles Times, Time magazine and the San Francisco Chronicle, among others.

The Investigative Reporting Workshop, a project of the School of Communication (SOC) at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about government and corporate

accountability, ranging widely from the environment and health to national security and the economy.

The McClatchy Company is a 21st century news and information leader, publisher of iconic brands such as the Miami Herald, The Kansas City Star, The Sacramento Bee, The Charlotte Observer, The (Raleigh) News and Observer, and the (Fort Worth) Star-Telegram. McClatchy operates media companies in 28 U.S. markets in 14 states, providing each of its communities with high-quality news and advertising services in a wide array of digital and print formats. McClatchy is headquartered in Sacramento, Calif., and listed on the New York Stock Exchange under the symbol MNI.

The Media Institute is a nonprofit research foundation specializing in communications policy issues founded in 1979. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. its program agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

MPA – The Association of Magazine Media (“MPA”) is the largest industry association for magazine publishers. The MPA, established in 1919, represents over 175 domestic magazine media companies with more than 900 magazine titles. The MPA represents the interests of weekly, monthly and quarterly publications that produce titles on topics that cover politics, religion,

sports, industry, and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

The National Press Photographers Association (“NPPA”) is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA’s approximately 7,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

POLITICO is a global news and information company at the intersection of politics and policy. Since its launch in 2007, POLITICO has grown to more than 350 reporters, editors and producers. It distributes 30,000 copies of its Washington newspaper on each publishing day, publishes POLITICO Magazine, with a circulation of 33,000 six times a year, and maintains a U.S. website with an average of 26 million unique visitors per month. Politico also publishes numerous newsletters, including four dedicated to Florida.

The Seattle Times Company, locally owned since 1896, publishes the daily newspaper *The Seattle Times*, together with *The Issaquah Press*, *Yakima Herald-*

Republic, Walla Walla Union-Bulletin, Sammamish Review and Newcastle-News, all in Washington state.

Society of Professional Journalists (“SPJ”) is dedicated to improving and protecting journalism. It is the nation’s largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

The Tully Center for Free Speech began in Fall, 2006, at Syracuse University’s S.I. Newhouse School of Public Communications, one of the nation’s premier schools of mass communications.

WPLG-TV, which operates as Local 10, is an ABC affiliate which serves the Miami-Fort Lauderdale area.

APPENDIX B

ADDITIONAL COUNSEL FOR AMICI CURIAE

Kevin M. Goldberg
Fletcher, Heald & Hildreth, PLC
1300 N. 17th St., 11th Floor
Arlington, VA 22209
*Counsel for American Society of News
Editors
Counsel for Association of Alternative
Newsmedia*

Christine Larkin
Senior Vice President / General
Counsel
A. H. Belo Corporation
1954 Commerce Street
Dallas, Texas 75201
*Counsel for The Dallas Morning
News, Inc.*

Jim Ewert, General Counsel
Nikki Moore, Legal Counsel
California News Publishers
Association
2701 K St.
Sacramento, CA 95816

David M. Giles
Vice President/
Deputy General Counsel
The E.W. Scripps Company
312 Walnut St., Suite 2800
Cincinnati, OH 45202

D. Victoria Baranetsky
General Counsel
The Center for Investigative
Reporting
1400 65th Street, Suite 200
Emeryville, California 94608

David Bralow
First Look Media Works, Inc.
18th Floor
114 Fifth Avenue
New York, NY 10011

Rachel Matteo-Boehm
Bryan Cave LLP
560 Mission Street, Suite 2500
San Francisco, CA 94105
Counsel for Courthouse News Service

Juan Cornejo
The McClatchy Company
2100 Q Street
Sacramento, CA 95816

Kurt Wimmer
Covington & Burling LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
Counsel for The Media Institute

James Cregan
Executive Vice President
MPA – The Association of Magazine
Media
1211 Connecticut Ave. NW Suite 610
Washington, DC 20036

Mickey H. Osterreicher
1100 M&T Center, 3 Fountain Plaza,
Buffalo, NY 14203
*Counsel for National Press
Photographers Association*

Elizabeth C. Koch
Ballard Spahr LLP
1909 K Street, NW
12th Floor
Washington, DC 20006-1157
Counsel for POLITICO LLC

Bruce E. H. Johnson
Davis Wright Tremaine LLP
1201 Third Ave., Suite 2200
Seattle, WA 98101
Counsel for The Seattle Times Co.

Bruce W. Sanford
Mark I. Bailen
Baker & Hostetler LLP
1050 Connecticut Ave., NW
Suite 1100
Washington, DC 20036
*Counsel for Society of Professional
Journalists*

CERTIFICATE OF SERVICE

I hereby certify that I have filed the foregoing Brief of *Amici Curiae* electronically with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the appellate CM/ECF system on September 28, 2018.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Bruce D. Brown

Bruce D. Brown, Esq.

Counsel of Record

THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS