No. 03-16581-C

In the

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOHN DOE,

Plaintiff-Appellee,

v.

BARROW COUNTY, GEORGIA, and
WALTER E. ELDER, in his official capacity as
Chairman of the Barrow County Board of Commissioners
and in his individual capacity,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Georgia
(D.C. Docket No. 03-CV-156)

APPELLANTS' RESPONSE TO THIS COURT'S MEMORANDUM TO COUNSEL OF JANUARY 12, 2004, CONCERNING JURISDICTION OF THIS APPEAL AND OPPOSING APPELLEE'S MOTION TO DISMISS FOR LACK OF JURISDICTION

Lionel J. Postic
POSTIC & BABB, P.C.
707 Whitlock Avenue
Whitlock Park Center, Suite D-31
Marietta, Georgia 30064-3033
Tele: (770) 795-9003

Herbert W. Titus
William J. Olson
John S. Miles
WILLIAM J. OLSON, P.C.
8180 Greensboro Drive,
Suite 1070
McLean, Virginia 22102-3860
Tele: (703) 356-5070

Counsel for Appellants

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INTRODUCTION

A. The Actions of the Parties Below.

On September 16, 2003, Plaintiff/Appellee "John Doe" ("Doe") filed in the court below a Complaint ("Compl.") seeking declaratory, injunctive and monetary relief from Defendants/Appellants, Barrow County, Georgia and Walter E. Elder, in his official capacity as Chairman of the Barrow County Board of Commissioners and in his individual capacity (hereinafter collectively "Barrow and Elder"), alleging, *inter alia*, a violation of his rights under the Establishment Clause as

applied to the States through the Fourteenth Amendment. Compl., Preliminary Statement attached hereto as Appendix A, p. 1.[1] Claiming to be a frequent visitor to the Barrow County Courthouse, Doe alleged in his Complaint that a "Ten Commandments display" that had been hung on the wall "by a Barrow County citizen with the consent, approval and authorization of Mr. Elder ... offends" him. Compl. ¶¶4, 12, 20 (App. A, pp. 3, 6, 9). Unwilling to identify himself by his true name, Doe announced in his Complaint that "he is proceeding anonymously because his 'religion is perhaps the quintessentially private matter,' and because he fears 'public reaction and retaliation' that may result in 'excessive harassment — and perhaps even violent reprisals." Compl.¶6 (App. A, p. 4).

At the time of the filing of his Complaint on September 16, 2003, Doe did not seek permission from the court below, either to file in a pseudonym, or to proceed anonymously. Hence, on November 6, 2003, Doe filed a Motion for a Preliminary Injunction, supported only by an affidavit signed "John Doe, Plaintiff," without furnishing the Plaintiff's true name even to the Court. *See* Affidavit of John Doe (hereinafter "Doe Aff.") (App. D), attached to Plaintiff's Motion for a Preliminary Injunction ("Pl. Injunc. Motion") (App. B) and Memorandum in Support of Motion

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[1] Referenced documents filed in the court below (*see* Docket in Appendix M) are included in attached Appendices A through L. Each docket reference herein will identify the document by name and by the lettered Appendix ("App.).

for a Preliminary Injunction (hereinafter "Pl. Injunc. Memo") (App. C). Doe declined to seek the District Court's permission to proceed under a pseudonym. Rather, relying on "the threats articulated in [his] affidavit," Doe unilaterally "believed that an anonymous affidavit is appropriate." Pl. Injunc. Memo, p. 3, n.1 (App. C, p. 3). Instead of seeking the District Court's permission, Doe put the burden on the court to step in, indicating that "[i]f the Court deems it more appropriate, the Plaintiffs [*sic*] will submit a motion for a protective order and file the affidavit in the name of the Plaintiff." *Id.*

Not until November 14, 2003, was the issue of Doe's claimed right to sue anonymously placed before the District Court. On that date Barrow and Elder filed their Motion to Dismiss Doe's Complaint and to Strike his Motion for a Preliminary Injunction on the ground, *inter alia*, that the District Court lacked jurisdiction over the anonymous plaintiff. In that motion, Barrow and Elder maintained that the District Court lacked jurisdiction because Doe — having filed the Complaint in a fictitious name without seeking leave of court at the time of the filing — failed to commence his lawsuit properly under Rule 3 of the Federal Rules of Civil Procedure ("F.R.Civ.P."), due to noncompliance with Rule 10(a), F.R.Civ.P., which requires that "the title of the action" set forth in the complaint "include the names of all the parties." *See* Defendants' Motion to Dismiss Plaintiff's Complaint and to Strike

Plaintiff's Motion for Preliminary Injunction ¶1 (hereinafter "Df. Motion to Dismiss") (App. E); Defendants' Memorandum of Law in Support of Motion to Dismiss Plaintiff's Complaint and to Strike Plaintiff's Motion for Preliminary Injunction, pp. 5-7 (hereinafter "Df. Dismiss Memo.") (App. F, pp. 5-7).

Relying primarily on the rule followed in the Tenth Circuit (*see* National Commodity & Barter Ass'n. v. Gibbs, 886 F.2d 1240, 1245 (10th Cir. 1989) and W.N.J. v. Yocom, 257 F.3d 1171, 1172 (10th Cir. 2001)), as previously applied in this Circuit by the District Court for the Northern District of Alabama in Estate of Rodriquez v. Drummond Co., Inc., 256 F. Supp. 2d 1250, 1255-57 (N.D. Ala. 2003), Barrow and Elder contended that Doe's failure to seek permission to proceed anonymously at the time of the filing of the complaint was a jurisdictional defect that could not be cured by Doe's late filing of a motion for leave to proceed anonymously. *See* Df. Dismiss Memo, pp. 8-10 (App. F, pp. 8-10).

On November 25, 2003, Doe filed his Response to Barrow and Elder's Motion to Dismiss, maintaining that Barrow and Elder's Motion to Dismiss "should be denied because there is no requirement that a motion to proceed anonymously be filed, let alone that it be filed contemporaneously with the filing of the complaint." Plaintiff's Response to Defendants' Motion to Dismiss Plaintiff's Complaint and to Strike Plaintiff's Motion for Preliminary Injunction, pp. 1-2, 10 ("Pl. Response to

Motion to Dismiss") (App. G, pp. 1-2, 10). On the same date, but only "out of an abundance of caution," Doe filed a Motion to Proceed Anonymously, along with a supporting Memorandum in which Doe reiterated the alleged threats to his privacy and of retaliation contained in the Doe Complaint and Affidavit, as previously submitted. *See* Plaintiff's Motion to Proceed Anonymously and Plaintiff's Memorandum in Support of Motion to Proceed Anonymously (App. H and I).

B. The Court Order Below.

On December 18, 2003, the court below denied Barrow and Elder's Motion to Dismiss. *See* Order dated December 18, 2003, pp. 8, 13 (hereinafter "Order") (App. L, pp. 8, 13). In so ruling, the District Court expressly rejected the holding in Rodriquez — a decision by the District Court for the Northern District of Alabama, a court within the Eleventh Circuit. *See* Order, pp. 4-6 (App. L, pp. 4-6). Instead, the court below followed E.W. v. New York Blood Ctr., 213 F.R.D. 108 (E.D.N.Y. 2003) — a decision of a district court in the Second Circuit (*see* Order, pp. 7-8) (App. L., pp. 7-8) — notwithstanding that the decision in E.W. directly conflicted with an earlier decision handed down by another district court in the Second Circuit. *See* Roe v. State of New York, 49 F.R.D. 279, 281 (S.D.N.Y. 1970). *See also* Df. Dismiss Memo, pp. 6, 8-10 (App. F, pp. 6, 8-10).

The court below attempted to bolster its decision to follow E.W., instead of

Rodriquez, by reference to two cases decided by the United States Court of Appeals for the Eleventh Circuit, wherein this Court had addressed the merits of a lower court's ruling denying a plaintiff's motion to proceed anonymously where the motion had not been filed contemporaneously with the complaint. *See* Order, pp. 6-7 (App. L, pp. 6-7). Although conceding that the jurisdictional question raised by Barrow and Elder **had neither been raised nor resolved** in those cases, the court below, "given the dearth of appellate decisions on point,"chose to rest on them, overcoming its "usual[] hesitan[cy] to rely on cases for an issue that was not directly discussed." *See* Order, p. 6 (App. L, p. 6).

Having thus ruled against Defendants' Motion to Dismiss, the court below addressed the merits of Plaintiff's Motion to Proceed Anonymously, ruling in favor of Doe's request to anonymously." *See* Order, p. 11 (App. L, p. 11) (emphasis added). In so ruling, the trial judge acknowledged that, because he was governed by the rule and analysis set forth in Doe v. Frank, 951 F.2d 320 (11th Cir. 1992), and Doe v. Stegall, 653 F.2d 180 (5th Cir. 1981), he must "consider and review all the circumstances" of this case. *See* Order, pp. 8-10 (App. L, pp. 8-10).

In Stegall, this Court identified "religion [as] the quintessentially private matter." Thus, this Court included in its analysis of the plaintiffs' request to proceed anonymously the fact that, by filing suit, the plaintiffs "made revelations about their

personal [religious] beliefs and practices that are shown to have invited opprobrium analogous to infamy associated with criminal behavior." Stegall, 653 F.2d at 186. In the Order at issue here, however, the court below found that Doe had sufficient "privacy concerns," even though the trial judge acknowledged that Doe "need not reveal his religious beliefs," but only "his beliefs concerning the proper interaction between government and religion." *See* Order, p.10 (App. L., p. 10). Moreover, the court below made no finding that such a revelation of Doe's beliefs would "invite[] opprobrium analogous to infamy associated with criminal behavior," as had been found in Stegall.

Although this Court in Doe v. Frank ruled that permission to proceed anonymously required, after consideration of all the circumstances, a finding of "real danger of physical harm," the court below neither considered all the circumstances, nor made any such finding. Instead, disregarding completely three witness Declarations submitted by Barrow and Elder concerning the absence of any threats of physical harm (*see* Declarations of Lane Downs, Dr. Jody Hice and Chief Deputy Sheriff Murray Kogod attached to Defendants' Memorandum in Opposition to Plaintiff's Motion to Proceed Anonymously (App. J, Exhs. A, B, and C), the court below considered only the hearsay-laden Affidavit of one person who claimed that she was "afraid" to speak out against "the display" together with Doe's generalized

claim that he feared "retaliation." *See* Affidavit of Elizabeth Beckemeyer (App.K) and Order, p. 10 (App. L, p. 10).

Additionally, the court below relied upon "angry and inappropriate voice messages" that the trial judge said that he and other judges had received from an unnamed "member of the community," and which the trial judge characterized as "attempt[s] to intimidate." *See* Order, p. 10 (App. L, p. 10). The court below made no effort to show how such messages constituted a violent threat to Doe, as required by Stegall and Frank, but only that the "angry and inappropriate voice messages" were "relevant to show the tenor being displayed by some members of the public." *See id.* at 11 (App. L, p. 11).

On this basis, the court below concluded that Doe should be allowed to proceed anonymously because "the court **feels** this is one of those rare cases in which the plaintiff should be permitted to proceed anonymously" (*id.*) (emphasis added)), and because "[i]n light of the response that these issues have generated from some in the community, the court **feels** it appropriate to allow plaintiff to proceed under a pseudonym." *Id.* at 12 (App. L, p. 12) (emphasis added). The court below ruled that Doe's identity would be made known only "to the court and counsel for the defense," and decided that "[a]ny proceedings necessary to determine standing, or other issues defendants wish to pursue with plaintiff, will be conducted in a

closed setting," not open to the public or to defendants. *Id.* at 11 (App. L., p. 11). In so ruling, the court below observed "that the inconvenience to defendants should be relatively low," since "[t]his is not a case that will be determined by plaintiff's credibility or recitation of facts." *Id*. Rather, the trial judge forecasted that the "**plaintiff** [will] play[] a **relatively minor role in this litigation**, and the constitutionality of the Ten Commandments display will be determined in proceedings open and accessible to all." *See id* at 12 (App. L, p. 12) (emphasis added).

C. The Appeal Before This Court.

On December 31, 2003, Defendants filed a Notice of Appeal from the District Court's December 18, 2003 Order, claiming a right to appeal the Order under 28 U.S.C.§1291, the Order being a "final decision" on a "collateral issue." Defendants' Civil Appeal Statement, p. 1. On January 12, 2004, this Court requested this Response to the question whether this Court has jurisdiction of this appeal under 28 U.S.C. §1291. And on January 15, 2004, Appellees filed a Motion to Dismiss this appeal on the ground that this Court has no jurisdiction.

ARGUMENT

I. THE DISTRICT COURT'S ORDER IS AN APPEALABLE FINAL DECISION.

Both this Court's January 12 Memorandum ("Jan. 12 Memo") and Doe's

Brief in Support of his Motion to Dismiss ("Doe's Brief") presumptively rest upon Catlin v. United States, 324 U.S. 229, 233 (1945), which states the general rule that an appealable final decision under 28 U.S.C. §1291 is "one which ends the litigation on the merits and leaves nothing for the court to do, but execute judgment." *See* Pitney Bowes, Inc. v. Mestre, 701 F.2d 1365, 1368 (11th Cir. 1983), cited on page 2 of the Jan, 12 Memo and Doe's Brief, p. 1. However, it has long been established by the United States Supreme Court that "[a]ppeals are allowed from orders characterized as final under the ["collateral issue"] doctrine even though it may be clear that they do not terminate the action." 15A Wright's *Federal Practice and Procedure* §3911 at 329, (citing Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949)).

As noted in their Civil Appeal Statement, Barrow and Elder have grounded their appeal in the Cohen "collateral issue" doctrine, not in the Catlin "final judgment" rule. This Court has previously held that rulings against a plaintiff who seeks to proceed anonymously are appealable pursuant to 28 U.S.C. §1291 under the "collateral issue" doctrine. According to S.M.U. v. Wynne & Jaffe, 599 F.2d 707, 711-12 (5th Cir. 1979), and Doe v. Stegall, 653 F.2d at 183 — both leading cases on

appeals by anonymous plaintiffs in this Circuit[2] — an order denying a plaintiff permission to proceed anonymously is a final decision within the meaning of 28 U.S.C. §1291 and, thus, appealable as a matter of right. Certainly, if the District Court had denied Doe's after-filed motion to proceed anonymously, Doe would have been entitled to file an immediate appeal under the SMU and Stegall rulings. For the reasons stated in those cases, the District Court's Order — denying Barrow and Elder's Motion to Dismiss, which sought dismissal on the ground that Doe has no right to proceed anonymously, and simultaneously granting Doe's after-filed Motion to Proceed Anonymously — is likewise a final decision, and similarly appealable under 28 U.S.C. §1291.

As demonstrated below, the ruling permitting Doe to proceed anonymously meets the three elements commonly required by the Supreme Court in "collateral issue" appeals: (1) the ruling "conclusively determine[s] the disputed question" whether Doe may proceed with his law suit under a pseudonym; (2) the ruling "resolve[s] an important issue completely separate from the merits" of the substantive constitutional claim that the existence of Ten Commandments picture on

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[2] Both cases, decided by the United States Court of Appeals for the Fifth Circuit prior to September 30, 1981, are part of "that body of law worthy for governance of legal affairs within the jurisdiction" of the Eleventh Circuit. Bonner v. City of Prichard, Ala., 661 F.2d 1206, 1209 (11th Cir. 1981).

a hallway wall of a courthouse violates the Establishment Clause as applied to the States; and (3) the ruling permitting Doe to proceed anonymously is "effectively unreviewable on appeal from a final judgment." *See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 375 (1981). *See also* Summit Medical Associates, P.C. v. Pryor, 180 F.3d 1326, 1334 (11th Cir. 1999). As also demonstrated below, the ruling denying Barrow and Elder' Motion to Dismiss on the grounds that Doe had not sought permission to file an anonymous complaint also meets these three criteria.

A. The District Court's Order is a Final Decision.

First, as was true of the orders denying plaintiffs' requests to proceed anonymously in the S.M.U. and Stegall cases, the District Court's Order "disposed of the disclosure issue, 'leaving nothing open, unfinished or inconclusive.'" *See* Stegall, 653 F.2d at 183. By coupling its order dismissing Barrow and Elder's Motion to Dismiss with its order granting Doe's motion to proceed anonymously, the District Court has ruled that Doe's true name "will be disclosed to the Court and to counsel for the defense" and that "[a]ny proceedings necessary to determine standing, or other issues defendants wish to pursue with the plaintiff, will be conducted in a closed setting." *See* Order, p. 11 (App. L, p. 11). Thus, there is "nothing open, unfinished, or inconclusive" left regarding the issue whether Doe's

real name will be disclosed to Barrow and Elder or to members of the public. Nor is there anything "open, unfinished, or inconclusive" left regarding the District Court's threshold ruling that it has jurisdiction of this case, notwithstanding Doe's failure to seek leave of the trial court to file his Complaint anonymously. *See* Order, pp. 8, 13 (App. L, pp. 8, 13). *See also* Mitchell v. Forsyth, 472 U.S. 511, 527 (1985); 15A Wright's *Federal Practice and Procedure* §3911, p. 345 (1992).

B. The Anonymity Issue is Completely Collateral.

Second, as was true in the S.M.U. and Stegall cases, the anonymity issue here is "'completely collateral to the cause of action asserted'" in Doe's Complaint. *See* Stegall, 653 F.2d at 183. According to the District Court, Doe's identity is totally irrelevant to the substantive constitutional question in this case, namely, whether the Ten Commandments picture violates the Establishment Clause as applied to the States via the Fourteenth Amendment. *See* Order, pp. 11-12 (App. L, pp. 11-12). Likewise, the District Court determined that Doe's true identity has no bearing on the threshold issue of standing, but only upon the nature of the "proceedings necessary to determine standing." *See id.* at 11 (App. L, p. 11). Barrow and Elder's appeal, therefore, is not from a ruling on "standing" or "justiciability," as Doe would have this Court believe. *See* Appellee's Brief in Support of Motion to Dismiss, pp. 3-4. Unlike a ruling on standing, the resolution of the question of whether Doe may

proceed anonymously, as in S.M.U. and Stegall, is not a "'mere step[] toward a final judgment on the merits,'" but rather "'completely collateral to the cause of action asserted.'" *See* Stegall, 653 F.2d at 183. Because the District Court's Order denying Defendants' Motion to Dismiss is based upon precisely the same collateral issue, that Order also satisfies the second element of an appealable final decision under 28 U.S.C. §1291. *See* Mitchell v. Forsyth, 511 U.S. at 527.

C. Barrow and Elder's Important Rights Are At Stake.

Third, as was true of the orders denying plaintiffs their requests to proceed anonymously in S.M.U. and Stegall, the District Court's order denying Barrow and Elder's Motion to Dismiss and granting Doe's Motion to Proceed Anonymously "'affected'" both Barrow County's and Elder's "important rights which would be lost probably irreparably if review had to wait for final judgment." *See* Stegall, 653 F.2d at 183. As demonstrated above, the District Court misapplied the law governing whether a plaintiff should be permitted to sue anonymously. *See* Part I. B., pp. 5-9. Indeed, the District Court's belittling rationale for permitting Doe to proceed anonymously because Doe will play only a "relatively minor role in this litigation"[3] is patently wrong. Whether Doe has standing in this case determines whether the District Court has jurisdiction over this dispute. As the Solicitor

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[3] *See* Order, p. 12 (App. L, p. 12).

General of the United States has recently observed in Elk Grove Unified School District v. Newdow, an Establishment Clause case now before the U. S. Supreme Court:

> "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." Ex parte McCardle, 7 Wall. 506, 514 (1869) (emphasis added); *see* Steel Co.. 523 U.S. at 94 (same). [Opposition of the United States to Respondent Newdow's Motion to Add Parties, p. 6, Elk Grove Unified School District v. Newdow (No. 02-1624) (emphasis original).]

Moreover, as the Solicitor General pointed out in his opposition memorandum, "at a minimum" the parties ought to know the true identity of a plaintiff, because anonymity "precludes the opposing parties from independently analyzing the factual assertion that the pseudonymous individual[] ha[s] standing." *Id.* at 9.[4]

Doe's standing in this case turns, first of all, upon the truth of the allegations in his Complaint that he "goes to the Courthouse on a regular basis" and that, "[i]n order to conduct [his] business [there] he must walk past the Ten Commandments display." Compl. ¶4, ¶19 (App. A, pp. 3, 8). Otherwise, Doe cannot show that he has been individually injured in fact. *See, e.g.,* Saladin v. City of Milledgeville, 812 F.2d 687, 692 (11th Cir. 1987); Harvey v. Cobb County, 811 F.Supp. 669, 674

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[4] Newdow's motion to add two anonymous persons as party plaintiffs has been denied. http://supremecourtus.gov/orders/courtorders/012604pzr.pdf.

(N.D. Ga. 1993), *affi'd. without opinion,* 15 F.3d 1097 (1994). *See also* Books v. Elkhart, 235 F.3d 292, 297, 299-300 (6th Cir. 2000), *cert. denied,* 532 U.S. 1058 (2001). In order to test the credibility of Doe's claims of regular visits to the courthouse, and forced viewing of the contested picture, Barrow and Elder would not be permitted under the District Court's Order to reveal Doe's true name to any Barrow County personnel or other potential witnesses who may have information that would contradict Doe's allegations.

Furthermore, compliance with the District Court's Order — which permits **only** Barrow and Elder' counsel, not Barrow and Elder themselves — to know Doe's true identity, would effectively prevent any meaningful appeal whether Barrow and Elder had been adversely affected in their investigation of Doe's claims. For example, one would never know whether disclosure of Doe's identity might have led to evidence undermining Doe's allegations of regular courthouse visits. Additionally, upon any appeal from an adverse final judgment, it would be impossible for Barrow and Elder to demonstrate that the District Court's adverse anonymity ruling prejudiced Barrow and Elder in their effort to refute standing, it being wholly speculative whether, had Doe's true identity been revealed to Barrow and Elder, any evidence refuting Doe's claims would have come to light.

The standing question also turns upon Doe's further claim that he is

"offend[ed] by "[t]he unwanted religious message" conveyed by the Ten Commandments display (*see* Compl. ¶20 (App. A, p. 9)), not that he merely suffers from some "psychological consequence ... produced by observation of conduct with which [he] disagrees." *Compare, e.g.,* A.C.L.U. of Ga. v. Rabun County Ch. of Commerce, 698 F.2d 1098, 1102-08 (11th Cir.1983), *with* Valley Forge Christian Coll. v Americans United for Separation of Church and State, 454 U.S. 464, 485-86 (1982). Whether Doe's injury is merely a psychological one arising out of his view of separation of church and state, as he appears to have alleged in paragraphs 4 and 20 of his Complaint (App. A, pp. 3, 9), or one that deeply offends Doe for reasons other than his constitutional views, turns largely upon the credibility of Doe's testimony. *See, e.g.,* Rabun County, 698 F.2d at 1108. Because of the District Court's Order, Barrow and Elder will be seriously hampered in any effort to test whether Doe has proved a redressible Establishment Clause claim. Furthermore, if Doe should prevail on the merits of his standing claim, with discovery limited by the District Court's Order, it would be wholly speculative whether Barrow and Elder could have found any evidence undermining Doe's claim that he suffered the kind of legal injury required to sustain a finding of an Establishment Clause violation. Thus, on an appeal from a final judgment on the merits of this case, it would be impossible for Barrow and Elder to establish that they were prejudiced by the Order at issue on

this appeal.

In sum, Barrow and Elder have established the third, and final, criterion of appealability set forth in Stegall, in that the District Court's Order, having erroneously applied the law governing anonymous plaintiff requests, affects "important rights which would be lost probably irreparably if review had to wait final judgment." Stegall, 635 F.2d at 183.

II. THE DENIAL OF BARROW AND ELDER'S MOTION TO DISMISS IS AN APPEALABLE FINAL DECISION PRESENTING A SERIOUS AND UNSETTLED ISSUE OF LAW.

The ruling denying Barrow and Elder's Motion to Dismiss, standing alone and apart from the ruling granting Doe permission to proceed anonymously, is a final decision appealable under 28 U.S.C. §1291. Like the defenses of Eleventh Amendment immunity and qualified immunity, the Rule 10(a) disclosure requirement, as applied to a plaintiff, is designed to immunize a defendant from having to defend a suit without knowing the true name of his adversary. Roe v. State of New York, 49 F.R.D. 279, 281-82 (S.D.N.Y. 1979). Thus, Rule 10(a) is designed not merely to protect a defendant from liability or damages, but from having to stand trial at all. Therefore, the District Court's denial of Barrow and Elder's Motion to Dismiss on Rule 10(a) grounds is — like a court ruling denying Eleventh Amendment immunity or qualified immunity — appealable as a "collateral

issue" under 28 U.S.C. § 1291. *See* CSX Transportation, Inc. v. Kissimmee Utility Authority, 153 F.3d 1283, 1285 (11th Cir. 1998).

Moreover, the District Court's ruling against Barrow and Elder's Motion to Dismiss presents a fourth element favoring this appeal, in that it involves a "serious and unsettled question of law." *See* 15A Wright's *Federal Practice and Procedure* §3911, p. 330 (2d Ed. 1991). The District Court acknowledged that the question whether a plaintiff must seek leave of court to file a complaint in a fictitious name is unsettled, there being a "dearth of appellate decisions in point." Order, p. 6 (App. L, p. 6). The District Court also conceded that federal district court opinions are in conflict. Moreover, by its decision to deny Barrow and Elder's Motion to Dismiss, the court below created a conflict within the Eleventh Circuit on this very jurisdictional question. *See* Order, pp. 4-6, 7-8 (App. L, pp. 4-6, 7-8).

In the court below, Doe simply presumed that he could initiate, and proceed with, this lawsuit without permission from the District Court, unless the court stopped him. *See* Compl. ¶6 (App. A, p. 4); Pl. Prelim. Injunc. Memo, p. 3, n.1 (App. C, p. 3). Such presumption flies in the face of the plain language of Rules 3 and 10(a), F.R.Civ.P., which clearly state that a "civil action is commenced by filing [with the court] a complaint[,] the title [of which] **shall** include the **names** of **all** the parties." (Emphasis added.) *See* Estate of Rodriquez v. Drummond Co., Inc., 256 F.

Supp. 2d at 1256. *See also* Roe v. New York, 49 F.R.D. at 280-81. Additionally, if a plaintiff, by his own unilateral decision, may employ a pseudonym to conceal his identity **before** ever seeking permission from a court to do so, such procedure undermines the First Amendment presumption of public access to civil court proceedings. *See* Rodriquez, 256 F.Supp.2d at 1256, quoting Doe v. Frank, 951 F.2d at 323. *See also* Doe v. Stegall, 653 F.2d at 186.

Unless this Court takes jurisdiction of this appeal now, the pre-trial discovery and trial proceedings that concern the testimony of Doe will be conducted in a "closed setting," out of view of both Barrow and Elder and the public. Only by granting Barrow and Elder's appeal now can this Court protect Barrow and Elder's important interests not to be erroneously subjected to a discovery process and trial hamstrung by the secret identity of their accuser, in disregard of their rights to a fair trial and in disregard of the First Amendment interests of the public and the press.

CONCLUSION

For the reasons stated, this Court should deny Doe's Motion to Dismiss this Appeal for lack of jurisdiction, and entertain this appeal under 28 U.S.C. §1291.

Respectfully submitted.

Herbert W. Titus
Counsel for Appellants