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)

BRIEF OF APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS
AND
CORPORATE DISCLOSURE STATEMENT

Undersigned counsel certifies that the following persons and entities may have an interest in the outcome of this case:

1. The Honorable William C. O'Kelley, Judge, United States District Court for the Northern District of Georgia, Gainesville Division
2. John Doe, anonymous plaintiff
3. Barrow County, Georgia, Defendant
4. Walter E. Elder III, as Chairman, Barrow County Board of Commissioners, and individually (now deceased)
5. Jerry Lampp, Barrow County Commissioner
6. William J. "Bill" Brown, Barrow County Commissioner
7. James Roger Wehunt, Barrow County Commissioner
8. Norma Jean Brown, Barrow County Commissioner
9. David Dyer, Barrow County Commissioner
10. Thad Brasfield, Barrow County Commissioner
11. Currie M. Mingledorff, former Barrow County Attorney
12. Angela Davis, Barrow County Attorney
13. Jarrard & Davis, LLP, Barrow County Attorney

14. Herbert W. Titus, Attorney for Defendants

15. William J. Olson, Attorney for Defendants

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18. Lionel J. Postic, Attorney for Defendants

19. Stan D. Babb, Attorney for Defendants

20. Postic & Babb, P.C., Attorney for Defendants

21. American Civil Liberties Union Foundation of Georgia

22. Gerald Weber, Attorney for Plaintiff

23. Frank Derrickson, Attorney for Plaintiff

24. Ralph Goldberg, Attorney for Plaintiff

25. Margaret "Maggie" Garrett, Attorney for Plaintiff

26. Foundation for Moral Law, Inc.

27. Benjamin DuPre, Attorney for Defendants

Herbert W. Titus
Counsel for Appellants

STATEMENT REGARDING ORAL ARGUMENT

Appellant hereby states that oral argument is desired. This appeal addresses an important jurisdictional question concerning the administration of Rules 3 and 10(a), Federal Rules of Civil Procedure, requiring this Court to resolve a conflict within the Eleventh Circuit between the ruling of the court below and the ruling of the United States District Court for the Northern District of Alabama in *Estate of Rodriquez v. Drummond Co., Inc.*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003). Additionally, this appeal addresses an important question concerning the legal standard to be applied in the Eleventh Circuit to plaintiffs who seek to sue in a fictitious name, and thereby to qualify as an exception to the compelling judicial and constitutional presumption of open and public trials, as laid down in *Doe v. Frank*, 951 F.2d. 320 (11th Cir. 1992).

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STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a)(3), as this case, brought pursuant to 42 U.S.C. § 1983, involves a federal question arising under the First and Fourteenth Amendments of the United States Constitution, and supplemental jurisdiction over two state constitutional claims pursuant to 28 U.S.C. § 1367(a).

Pursuant to 28 U.S.C. § 1291, this Court has jurisdiction of this appeal from the district court's order denying appellant's motion to dismiss and granting appellee's motion to proceed anonymously under the "collateral issue" doctrine. *See S.M.U. v. Winne & Jaffe*, 599 F.2d 707, 711-12 (5th Cir. 1979); *Doe v. Stegall*, 653 F.2d 180, 183 (5th Cir. 1981).

STATEMENT OF THE ISSUES

1. Whether this Court has jurisdiction of this appeal from the District Court's Order denying Barrow County's Motion to Dismiss and granting Plaintiff's Motion to Proceed Anonymously because that Order is a "final decision" under the "collateral issue" doctrine of 28 U.S.C. § 1291.

2. Whether the District Court erroneously denied Barrow County's Motion to Dismiss because it lacked jurisdiction of Plaintiff's "John Doe" Complaint, which was filed on September 16, 2003, without leave of court, in violation of the requirement of Rule 10(a), Federal Rules of Civil Procedure, that a complaint must contain the true "names of all the parties."

3. Whether the District Court erred in granting Plaintiff John Doe's subsequently-filed Motion to Proceed Anonymously, by failing as a matter of law to comply with this Court's rulings limiting permission to sue anonymously to exceptional cases based either upon a "substantial privacy interest" or "real danger of physical harm" or, in the alternative, whether the District Court abused its discretion by misapplying this Circuit's rules governing permission to sue in a fictitious name.

STATEMENT OF THE CASE

This appeal concerns the procedural and substantive law governing whether the "John Doe" Plaintiff in this case may file his complaint and proceed to trial and

judgement without disclosing his true name to either Defendant Barrow County or the public, or to the press or other media regularly covering this case.

A. Course of Proceedings and Disposition Below.

On September 16, 2003, Plaintiff/Appellee "John Doe" ("Doe") filed in the court below his Complaint 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 "Barrow County")[1], alleging, *inter alia*, a violation of his rights under the Establishment Clause as applied to the States through the Fourteenth Amendment. Doc 1, Pg 1. At the time of the filing of his Complaint, Doe revealed that John Doe was not his true name, but he did not seek permission from the court below to file in a pseudonym. Doc 1, Pg 4.

On November 6, 2003, again without seeking permission of the District Court to proceed anonymously, Doe filed a Motion for a Preliminary Injunction, supported by an affidavit signed "John Doe, Plaintiff." Doc 3, Pgs 31-35.

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[1] On February 6, 2004 Defendant Elder died. On March 1, 2004, by Stipulation of Voluntary Dismissal under Rule 41(a)(1)(ii), F.R.Civ.P., Mr. Elder was dismissed as a defendant in the court below. On March 8, 2004, Barrow County filed in this Court a Motion to Dismiss Mr. Elder as an appellant in this case, attaching in support a certificate of Mr. Elder's death. As of March 19, 2004, this Motion was still pending.

On November 14, 2003, Barrow County filed a Motion to Dismiss the Complaint and a Motion to Strike the Motion for a Preliminary Injunction on the ground, *inter alia*, that Doe had failed to seek the trial court's permission to file his complaint and motion for preliminary injunction in a fictitious name and that the District Court thus lacked jurisdiction over the case. Doc 6, Pgs 1-2, 8-12.

On November 26, 2003, Doe filed his Response to Barrow County's Motion to Dismiss, claiming that he was not required to seek the District Court's permission "to proceed anonymously." Doc 9, Pgs 1- 2. On the same date, Doe "[i]n an abundance of caution" (Doc 9, Pg 2), filed his Motion to Proceed Anonymously. Doc 10, Pgs 1-2.

On December 18, 2003, the District Court entered an Order denying Barrow County's Motion to Dismiss and granting Doe's Motion to Proceed Anonymously. Doc 21, Pg 13.

On December 31, 2003, Defendants filed a Notice of Appeal from the District Court's December 18, 2003 Order.[2] Doc 23.

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[2] On January 12, 2004, this Court requested all parties to file a Response to the question whether this Court has jurisdiction of this appeal under 28 U.S.C. § 1291. On January 15, 2004, Doe filed a Motion to Dismiss this appeal for lack of jurisdiction. On January 30, 2003, Barrow County filed its Response, maintaining that this Court has jurisdiction because the District Court's December 18, 2003 Order is a "final decision" according to the "collateral issue" doctrine under 28 U.S.C. § 1291.

B. Statement of Facts.

1. The Actions of the Parties Below.

In his Complaint, Doe announced 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.'" Doc 1, Pg 3. In his Affidavit filed in support of his subsequently-filed Motion for Preliminary Injunction, Doe dropped his privacy allegation, reiterating only his claim that he "feared retaliation from my community against both myself and my family." Doc 3, Pg 33.

In the filing of both his Complaint and his Motion for a Preliminary Injunction, Doe presumed that he did not need the District Court's permission to proceed anonymously. As Doe asserted in his Memorandum in Support of A Preliminary Injunction, "in light of the threats that are articulated in the affidavit ... an anonymous affidavit is appropriate." Doc 3, Pg 6, n.l. At this point in the proceeding below, Doe conceded only that District Court had discretion to require from Doe "a motion for a protective order," enabling Doe to "file the affidavit" in his true name and still maintain his anonymity. *See* Doc 3, Pg 6, n.1.

On November 14, 2003, Barrow County challenged Doe's presumption that he could sue under a fictitious name without leave of the District Court. In its

Memorandum in Support of its Motion to Dismiss, Barrow County asserted that Doe had failed to comply with the Rule 10(a), F.R.Civ.P., requirement that "the title of [any] action" set forth in a complaint must "include the names of all the parties." Doc 6, Pgs 8-12. Because Doe had failed to comply with Rule 10(a), and further because Doe had failed to seek the District Court's permission for leave not to comply with Rule 10(a), Barrow County argued that Doe had failed to "fil[e] a complaint" with the court and, hence, had failed to "commence[] any "civil action" against Barrow County under Rule 3, F.R.Civ.P. Doc 6, Pgs 8-9.

Additionally, 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 County 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. Doc 6, Pgs 11-13.

In his Response to Barrow County's Motion to Dismiss, Doe claimed that "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." Doc 9, Pgs 1-2, 10. Furthermore, Doe insisted that failure to seek permission to sue in a fictitious name was not a jurisdictional defect, but merely a formality that could be dispensed with in the interest of "judicial economy." Doc 9, Pg 10. Hence, Doe filed his Motion to Proceed Anonymously, not because it was required, but "in an abundance of caution," reiterating his claims set forth in his Complaint and Affidavit in Support of his Motion for a Preliminary Injunction that he was entitled to proceed anonymously "because religious matters are private and because he fears retaliation for having filed the lawsuit." Doc 10, Pg 4.

In its Memorandum in Opposition to Doe's Motion to Proceed Anonymously, Barrow County relied upon Doe's failure to make a showing sufficient to overcome the strong presumption under the federal rules against permitting a plaintiff to proceed under a pseudonym, as reflected in the stringent test that this Court laid down in *Doe v. Frank*, 951 F.2d 320 (11th Cir. 1992), to ensure that anonymity was permitted only after "review [of] *all* the circumstances of a given case," and only then in the "exceptional case." *Id*. at 323 (emphasis original). Doc 13, Pg 5. *See also Doe v. Stegall,* 653 F.2d 180 (5th Cir. 1981).

2. The Decision of the Court Below.

On December 18, 2003, the District Court denied Barrow County's Motion to Dismiss the Complaint and granted Doe's Motion to Proceed Anonymously. In ruling against Barrow County's Motion to Dismiss, the District Court expressly rejected the holding in *Rodriquez* — the decision by the District Court for the Northern District of Alabama, a court within the Eleventh Circuit — that a motion to proceed anonymously must accompany a complaint filed by an anonymous plaintiff. Doc 21, Pgs 4-6. Instead, the District Court 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. Doc 21, Pgs 7-8.

In justification of its decision not to follow *Rodriquez*, the District Court cited *Roe II v. Aware Woman Ctr. for Choice, Inc.*, 253 F.3d 678 (11th Cir. 2001), and *Doe v. Frank, supra,* wherein this Court had previously addressed the merits of lower court rulings denying plaintiffs' motions to proceed anonymously filed subsequent to the filing of their complaints. Doc 21, Pgs 6-7. Although conceding that, in the cited cases, "nobody [had] raised the question of whether the late filing of the motion to proceed anonymously deprived the courts of jurisdiction," the District Court overcame its "usual[] hesitan[cy] to rely on cases for an issue that

was not directly discussed," and rested its decision upon them, "given the dearth of appellate decisions on point." Doc 21, Pg 6.

Having ruled against Barrow County's Motion to Dismiss, the court below addressed the merits of Plaintiff's Motion to Proceed Anonymously. Doc 21, Pgs 8-13. Acknowledging that it was governed by the rule and analyses set forth in *Doe v. Frank* and *Doe v. Stegall*, the District Court stated that it must "consider and review all the circumstances of this case." Doc 21, Pg 10.

Relying upon the statement in *Stegall* — that "religion is perhaps the quintessentially private matter" — the District Court appeared to agree with Barrow County's contention "that plaintiff will not need to reveal his religious beliefs." *See* Doc 21, Pg 10. Nonetheless, the court below concluded that because plaintiff will be "require[d] to reveal his beliefs concerning the proper interaction between government and religion," such "concerns can implicate privacy matters similar to those associated with actual religious teachings and beliefs." Doc 21, Pg 10. Thus, the District Court "acknowledge[d] plaintiff's privacy concerns" without making any finding whether those concerns were substantial or insubstantial. *See* Doc 21, Pg 10.

Although the District Court acknowledged that *Doe v. Frank* required that it consider **all** the circumstances before finding of "real danger of physical harm," the

court below neither considered all the circumstances, nor made any specific finding of a real danger of physical harm. *See* Doc 21, Pgs 10-11. Instead, failing even to acknowledge the existence of three witness declarations submitted by Barrow County concerning the absence of any threats of physical harm (Doc 13, Pgs 14-17), the court below "consider[ed]" only the two affidavits submitted by Doe — Doe's and a Ms. Elizabeth Beckemeyer's — and unidentified "angry and inappropriate voice messages" that the trial judge and other judges had apparently received from "at least one member of the community," without identifying either the "member" or the "community." Doc 21, Pgs 10-11.

Moreover, the court below made no effort to show how either the two affidavits or the unnumbered and unidentified "voice messages" established a "real danger of physical harm" to Doe, as required by *Stegall* and *Frank.* Doc 21, Pgs 10-11. Instead of making a factual finding, the District Court based its decision to grant Doe's Motion to Proceed Anonymously upon its "**feel**[ing] [that] this is one of those rare cases in which the plaintiff should be permitted to proceed anonymously" (*see* Doc 21, Pg 11) (emphasis added)), and upon its "**feel**[ing] [that] it [would be] appropriate to allow plaintiff to proceed" anonymously "[i]n light of the response that these issues have generated from some in the community." Doc 21, Pg 12 (emphasis added).

In granting Doe's Motion to Proceed Anonymously, the District Court ruled that Doe's identity would be made known only "to the court and counsel for the defense," and 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 Barrow County, or to the general public, or to the press and other media. Doc 21, Pg 11. In so ruling, the court below opined "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." Doc 21, Pg 11. The court further observed 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." Doc 21, Pg 12.

C. The Standard of Review.

In ruling against Barrow County's Motion to Dismiss, the District Court erred in formulating and applying the rule of law governing the commencement of a civil action under Rules 3 and 10(a) of the Federal Rules of Civil Procedure. Because this ruling is a jurisdictional one, the standard of review is *de novo*. *National Commodity & Barter Ass'n. v. Gibbs*, 886 F.2d 1240, 1245 (10th Cir. 1989). In ruling in favor of Doe's Motion to Proceed Anonymously, the District Court erred in formulating and applying the rule of law governing anonymous

plaintiffs. Thus, the standard of review is *de novo.* *See James v. Jacobson*, 6 F.3d 233, 240-41 (4th Cir. 1993). In the alternative, the District Court's ruling in favor of Doe's Motion to Proceed Anonymously was an abuse of discretion, reviewable by this Court for clear error. *See, e.g., Roe II v. Aware Woman Ctr.,* 253 F.3d at 684.

SUMMARY OF ARGUMENT

This Court has jurisdiction of this appeal from the District Court's December 18, 2003 Order because that Order is a "final decision" on a "collateral issue," and thus appealable under 28 U.S.C. § 1291. The Order is a "final decision" because it: (1) conclusively determined the disputed question whether Doe could proceed under a pseudonym; (2) resolved an issue completely separate from the merits of the claims alleged in Doe's complaint; and (3) constituted a ruling that is effectively unreviewable upon appeal from a final judgment. Additionally, the Order, insofar as it ruled against Barrow County's Motion to Dismiss, completely deprived Barrow County of the benefit of not having to respond to a complaint filed without compliance with Rule 10(a), F.R.Civ.P., and resolved a serious and unsettled issue of law governing the procedure by which a plaintiff must seek leave of court to file a complaint in noncompliance with Rule 10(a).

Rules 3 and 10(a), F.R.Civ.P., require that a "civil action" may be "commenced" only upon the filing of a complaint, the title of which "**shall** include the names of **all** the parties" (emphasis added). The complaint filed in this case did not contain the true name of the plaintiff, and was not accompanied by any motion, or other request, for leave to file using a fictitious name. Thus, because no complaint was filed in the manner required by the federal rules, the court below lacked jurisdiction over the Complaint. Because the defect in the Complaint was jurisdictional, it was not — and could not be — cured by Doe's subsequently-filed Motion to Proceed Anonymously. Thus, the District Court erroneously denied Barrow County's Motion to Dismiss the Complaint for lack of jurisdiction.

Even if the defect could have been cured by the granting of Doe's Motion to Proceed Anonymously, the District Court's December 18, 2003 Order erroneously granted that motion. According to the governing precedents of this Court, a motion to proceed anonymously may be granted only if a plaintiff demonstrates either a substantial privacy interest or a real physical danger that overcomes the judicial and constitutional presumption of open and public trials. The court below did not abide by this legal standard, failing both to consider **all** of the circumstances, and to make **any findings of fact** either of a substantial privacy interest or a real physical danger, as required by *Doe v. Frank, supra.*

Additionally, the District Court abused its discretion in applying the *Frank* standard by utterly failing to consider any evidence produced by Barrow County, and to find any facts; instead, the court below relied solely upon its subjective **feelings**, which is clear error to the prejudice of Barrow County in the conduct of its defense and which requires reversal.

ARGUMENT

I. THIS COURT HAS JURISDICTION OF THIS APPEAL.

Although it is 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), quoting *Catlin v. United States*, 324 U.S. 229 (1945)), 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, p. 329 (citing *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)).

Barrow County has based its appeal on the *Cohen* "collateral issue" doctrine, not on the *Pitney Bowes* "final judgment" rule. This Court has previously held that rulings **against** plaintiffs who seek to proceed anonymously are appealable

pursuant to 28 U.S.C. § 1291 under the "collateral issue" doctrine. *See S.M.U. v. Wynne & Jaffe,* 599 F.2d 707, 711-12 (5th Cir.1979), and *Doe v. Stegall*, 653 F.2d at 183.[3] 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 *S.M.U.* and *Stegall* rulings. For the reasons stated in those cases, the District Court's December 18, 2003 Order — both in its denial of Barrow County's Motion to Dismiss and in its grant of 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 Order denying Barrow County's Motion to Dismiss and granting Doe's Motion 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 a hallway

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[3] Both *S.M.U.* and *Stegall* were decided before September 30, 1981, by the Court of Appeals for the Fifth Circuit and thus, are part of "that body of law worthy for governance of legal affairs within the jurisdiction" of the Eleventh Circuit. *Bonner v. City of Pritchard, Ala*., 661 F.2d 1206, 1209 (11th Cir. 1981).

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).

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

First, 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 County'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* Doc 21, Pg 11. Thus, there is "nothing open, unfinished, or inconclusive" regarding the issue whether Doe's real name will be disclosed to Barrow County 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.

See Doc 21, Pgs 8, 13. *See also Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985); 15A Wright's *Federal Practice and Procedure* § 3911, at 345 (1992).

B. The Anonymity Issue Is Completely Collateral.

Second, 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* Doc 21, Pgs 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* Doc 21, Pg 11. Barrow County's appeal, therefore, is not one from a ruling on "standing" or "justiciability." Unlike a ruling on standing, the resolution of the question of whether Doe may proceed anonymously 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 Barrow County's Motion to Dismiss is based upon precisely the same collateral issue, that part of the Order also satisfies the second element of an

appealable final decision under 28 U.S.C. § 1291. *See Mitchell v. Forsyth*, 472 U.S. at 527.

C. Barrow County's Important Rights Will Be Lost.

Third, the District Court's order denying Barrow County's Motion to Dismiss and granting Doe's Motion to Proceed Anonymously "'affected'" Barrow County's "'important rights which would be lost, probably irreparably' if review had to await final judgment." *See Stegall*, 653 F.2d at 183. As demonstrated in Part III below, the District Court misapplied the law governing whether a plaintiff should be permitted to sue anonymously. Indeed, the District Court's belittling rationale for permitting Doe to proceed anonymously — that Doe will play only a "relatively minor role in this litigation"[4] — is patently wrong. Whether Doe has standing in this case determines whether the District Court has jurisdiction over this dispute. As the Solicitor 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. [v. Citizens for a Better

[4] *See* Doc 21, Pg 12.

> Env't], 523 U.S. [83] at 94 [1998] (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 further pointed out, "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.[5]

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." Doc 1, Pgs 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 (N.D. Ga. 1993), *aff'd without opinion*, 15 F.3d 1097 (11th Cir. 1994). *See also Books v. Elkhart*, 235 F.3d 292, 297, 299-300 (7th 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 County would not

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[5] The Solicitor General's position was upheld and respondent Newdow's motion to add two anonymous persons as party plaintiffs was denied. http://supremecourtus.gov/orders/courtorders/2604pzr.pdf.

be permitted under the District Court's Order to reveal Doe's true name to any county personnel, or to any other potential witnesses who may have information that would directly contradict Doe's jurisdictional allegations.

Furthermore, compliance with the District Court's Order —which permits only Barrow County's counsel, not Barrow County itself, to know Doe's true identity — would effectively prevent, after final judgment, any meaningful appeal with respect to the issue whether Barrow County was adversely affected in its investigation of Doe's claims. For example, if forced to wait after the trial is over, one would never know whether disclosure of Doe's identity might have led to evidence undermining Doe's allegations of regular courthouse visits. Thus, after the trial is over, it would be impossible for Barrow County to demonstrate that the District Court's adverse anonymity ruling prejudiced the county in its effort to refute standing, it being wholly speculative whether, had Doe's true identity been revealed to Barrow County, 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* Doc 1, Pg 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 (Doc 1, Pgs 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 County will be seriously hampered in any effort to test whether Doe has proved a redressible Establishment Clause claim. Indeed, Barrow County is barred from deposing any person who would know the plaintiff, and would refute his claims.

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 County 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 County to establish that it was prejudiced by the Order at issue here.

In sum, Barrow County has established the third 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*, 653 F.2d at 183. Having met all three criteria, this Court has jurisdiction of this appeal and should resolve it on the merits. And there is even further reason for this Court to exercise jurisdiction over the District Court's December 18, 2003 Order insofar as it denied Barrow County's Motion to Dismiss.

D. This Appeal Presents a Serious and Unsettled Issue of Law.

The ruling denying Barrow County's Motion to Dismiss, standing alone and apart from the ruling granting Doe permission to proceed anonymously, is also a final decision appealable under 28 U.S.C. § 1291. Like the defenses of Eleventh Amendment immunity and qualified immunity, the Rule 10(a), FR.Civ.P., 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). Rule 10(a) is designed not just to protect defendants from liability or damages, but

has been fashioned to protect the public interest in open court proceedings, as well as defendants' interests in not having to stand trial at all. *Id.* at 282. Therefore, the District Court's denial of Barrow County's Motion to Dismiss on Rule 10(a) grounds — like a court ruling denying Eleventh Amendment immunity or qualified immunity — is appealable under the "collateral issue"doctrine. *See CSX Transportation, Inc. v. Kissimmee Utility Authority*, 153 F.3d 1283, 1285 (11th Cir. 1998).

Thus, the District Court's ruling against Barrow County'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 at 330. 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." Doc 21, Pg 6. The District Court also conceded that federal district court opinions are in conflict. Moreover, by its decision to deny Barrow County's Motion to Dismiss, the court below created a conflict within the Eleventh Circuit on this very jurisdictional question. Doc 21, Pgs 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* Doc 1, Pg 3; Doc 3, Pg 6, n.l. 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 a complaint, the title of which **shall** include the **names** of **all** the parties. *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, citing *Doe v. Frank*, 951 F.2d at 323. *See also Doe v. Stegall*, 653 F.2d at 186.

Unless this Court takes jurisdiction of and decides 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 Barrow County, the general public, and the press and other media. Only by granting Barrow County's appeal now can this Court protect Barrow County's important interests not to be erroneously subjected to a discovery process and trial, hamstrung by the secret identity of its accuser, in disregard of its rights to a fair trial and in disregard of the First Amendment interests of the public and the press.

II. PLAINTIFF FAILED TO COMMENCE A CIVIL ACTION.

Rule 3, F.R.Civ.P., states that a "civil action is commenced by filing a complaint with the court." Rule 10(a), F.R.Civ.P., states that "[i]n the complaint the title of the action shall include the names of all the parties." At the time that Doe filed his complaint, the title therein did not include his name, as clearly evidenced by the allegation in Paragraph 6 that "Plaintiff, John Doe is proceeding anonymously." Doc 1, Pg 4. As the District Court observed in *Roe v. New York*, "if a complaint does not identify any plaintiff in the title or otherwise, then the filing is ineffective to commence an action." *Id*., 49 F.R.D. at 281. It also is inescapable, as the District Court for the Northern District of Alabama concluded in *Rodriquez*, that until a civil action is commenced under the federal rules, a district court has no jurisdiction, and the complaint must be dismissed. *Id*., 256 F. Supp. 2d 1250, 1255-56. As the court in *Rodriquez* further pointed out, quoting from this Court's opinion in *Doe v. Frank*, Rule 10(a) "'serves more than administrative convenience, [in that it] protects the public's legitimate interest in knowing all of the facts involved, including the identities of the parties.'" *Rodriquez*, 256 F. Supp. 2d at 1256.

The District Court below attempted to end run this jurisdictional problem by employing Rule 17(a), F.R.Civ. P., likening a plaintiff's decision to sue in a

pseudonym to a law suit brought in the **real** name of a person but who is not "the real party in interest." Doc 21, Pg 7 (emphasis added). The analogy is specious, as Rule 17(a) clearly does not apply. "John Doe" **is** the real party in interest in this case. Thus, Barrow County's Motion to Dismiss was based upon the ground that John Doe was not the **real** name of the plaintiff, **not** upon "the ground that [this lawsuit] is not prosecuted in the name of the real party in interest," as described in Rule 17(a). By its very terms, then, Rule 17(a) is inapposite, and the District Court erred in relying on it to confer jurisdiction over a complaint that fails to meet the requirements of Rule 10(a).

To be sure, it is well established that a court may, in its discretion, grant an exception to the Rule 10(a) requirement, but, in order to exercise such discretion, a court must first have jurisdiction over the action before it can act. *See Roe v. New York*, 49 F.R.D. at 281. Such jurisdiction may be obtained by a plaintiff seeking to proceed anonymously by filing a complaint under seal, and by submitting separately plaintiff's true name under seal coupled with a motion to proceed anonymously and an appropriately-crafted protective order. *See id*.

Requiring Doe to follow this simple procedure is not a procedural technicality, as Doe contended below. *See* Doc 9, Pg 9. Nor does it place form over substance. Rather, because it is "John Doe," not Barrow County, who seeks

an exception from compliance with the Federal Rules of Civil Procedure, Doe should bear the burden of coming forward with a colorable request to proceed under a fictitious name. Otherwise, the clear rule — embraced by this Court in *Stegall* and *Frank* — is clouded by the reality that a plaintiff is free to ignore Rule 10(a), unless the defendant resists by filing a motion to dismiss, or the court *sua sponte* stops him. And that is exactly what occurred below, as Doe presumed that he could proceed under a fictitious name unless prevented from doing so. *See* Doc 1, Pg 3; Doc 3, Pg 6, n.1.

Doe's tactic of presuming that he could sue under a pseudonym — Rule 10(a), F.R.Civ.P. notwithstanding — also interposed a collateral issue upon Barrow County's decision whether to raise any of its merit defenses by a Rule 12(b) motion. Had the court below required Doe to refile his complaint with a motion for leave to file anonymously, Barrow County would not have been compelled to expend its one opportunity to file a Rule 12(b) motion to challenge the District Court's jurisdiction on the anonymity issue.

Finally, and importantly, by allowing Doe to file publicly his complaint under a pseudonym — without an appropriate prior and nonpublic hearing on Doe's allegations of "privacy," "retaliation," "harassment," and possible "violent reprisals" (Doc 1, Pg 4) — the District Court permitted Doe to impose upon

Barrow County the adverse publicity and public disapprobation that arises not only from being named as a defendant in a lawsuit, but from Doe's claims of "intimidation" as well. Doc 1, Pg 4. Had Doe been required to file his complaint under seal, accompanied by a motion for leave to file anonymously, Barrow County would have been protected from such claims, unless and until the court below found them to have been factually and legally sufficient to justify Doe's request to proceed under a fictitious name.

III. THE DISTRICT COURT FAILED, AS A MATTER OF LAW, TO COMPLY WITH, AND ABUSED ITS DISCRETION IN THE APPLICATION OF, THIS COURT'S RULES GOVERNING ANONYMOUS PLAINTIFFS.

As the District Court acknowledged in its December 18, 2003 Order, this Court has established "only" three separate categories of plaintiffs who are permitted to sue in a fictitious name: (1) plaintiffs in cases which "involv[e] matters of a highly sensitive and personal nature"; (2) plaintiffs in cases where there is a "real danger of physical harm"; and (3) plaintiffs in cases "where the injury litigated against would be incurred as a result of the disclosure of the plaintiff's identity." Doc 21, Pg 9 (citing *Doe v. Frank*, 951 F.2d at 324). Doe made no attempt to fit his case within the third category. And the District Court neither complied with the law, nor applied the law to the facts, when it granted Doe's motion based upon his twin claims of privacy and of possible danger. Thus,

the District Court erred by failing to comply with the law that governed its decision whether to grant Doe his Motion to Proceed Anonymously, and committed clear error in the abuse of its discretion in applying that law to the facts of this case.

A. The District Court Did Not Find a Substantial Privacy Interest.

In *Roe II v. Aware Woman Center for Choice, Inc.*, this Court found an abortion-seeking plaintiff to be "the paradigmatic example of the type of highly sensitive and personal matter that warrants a grant of anonymity." *Id*., 253 F.3d 678, 685 (11th Cir. 2001). Thus, this Court found that a plaintiff who brought suit against an abortion clinic should be permitted to proceed anonymously because she met the *Frank* test, which requires proof of a "substantial privacy right which outweighs the 'customary and constitutionally-embedded presumption of openness in judicial proceedings.'" *Id.* The court below, however, made no finding that Doe had a "substantial privacy right," and made absolutely no effort to determine whether Doe's claimed privacy right outweighed the presumption of openness in judicial proceedings. *See* Doc 21, Pg 10.

Unlike the plaintiff in *Roe II*, Doe did **not** claim that he would be forced to reveal "information of the utmost intimacy" concerning his religious practices and beliefs. *Compare* Doc 1, Pg 4. *with Roe II*, 253 F.3d at 685. Rather, Doe simply asserted the general proposition that "religious matters are private." Doc 10, Pg 4.

Not surprisingly, in light of Doe's tepid allegations, the District Court made no finding that Doe had a substantial privacy right. Instead, the court below concluded that Doe merely had "privacy concerns." Doc 21, Pg 10. Even then, the trial judge did not find Doe's privacy concerns to be attached to the forced disclosure of his "actual religious teachings and beliefs," but only to "his beliefs concerning the proper interaction between government and religion." Doc 21, Pg 10. With respect to Doe's actual religious beliefs, the District Court conceded that Doe "might not [even] need to directly state his religious affiliation, or lack thereof." Doc 21, Pg 10.

Yet, even in light of this concession, the District Court ordered this case to be litigated under a shroud of secrecy. The District Court concluded that Doe's "beliefs concerning the proper interaction between government and religion" were "privacy matters **similar** to those associated with actual religious teachings and beliefs." Doc 21, Pg 10 (emphasis added). This conclusion is illogical and comes close to being absurd. One's personal religious beliefs and practices, such as prayer, worship, and other "devotional observances" (*see Stegall*, 653 F.2d at 182), are fundamentally different from one's views about the "interaction between government and religion." Indeed, the very fact that Doe filed his Complaint demonstrates that issues concerning the proper relationship between church and

state — while sometimes informed in whole or in part by one's religious views — are **public** issues related to proper political and legal relationship between church and state. Even the District Court recognized this fact in its December 18, 2003 Order by its ruling that, while the issue of Doe's standing in this case would be conducted in private, "the constitutionality of the Ten Commandments display will be determined in proceedings open and accessible to all." Doc 21, Pg 12.

The District Court's conclusion that it must "acknowledge[] plaintiff's privacy concerns" in its decision on Doe's Motion to Proceed Anonymously (*see* Doc 21, Pg 10) was, therefore, clearly erroneous, incompatible with the clear ruling of *Roe II* that any privacy claim by an anonymous plaintiff must be substantial enough to override the judicial and constitutional assumption of a public trial.

Moreover, the District Court utterly failed to comply with the legal standards which **require** that Doe's privacy concerns be rooted in his private religious practices and beliefs. *Compare Stegall*, 653 F.2d at 182, 186, *with* Doc 21, Pg 10. Nor did the court below find, as this Court did in *Stegall*, that Doe's fears that what might be required to reveal about his "personal beliefs and practices [would] have attracted an opprobrium analogous to the infamy associated with criminal behavior." *Compare Stegall*, 653 F.2d at 186, *with* Doc 21, Pg 10.

Because Doe's "privacy concerns"were neither grounded in a recognized privacy category nor considered substantial enough to outweigh the presumption of open judicial proceedings, the District Court erroneously relied on them, contrary to *Doe v. Frank*. *See Roe II*, 253 F.3d at 684-85.

B. The District Court Did Not Find a Real Danger of Physical Harm.

Not only did the District Court fail to follow the rule governing privacy claims in *Doe v. Frank*, but it failed to observe the *Frank* requirement that there be a "real danger of physical harm ... in which the need for party anonymity outweighs the presumption of openness." *Doe v. Frank*, 951 F.2d at 324. Indeed, Doe failed to present to the District Court any evidence that he was threatened physically in any way, or that anyone else in the community had been so threatened.

In his Complaint, Doe alleged no facts to support his feelings that he fears "'public reaction and retaliation' that may result in 'extensive harassment — and perhaps even violent reprisals.'" Doc 1, Pg 4. In his affidavit in support of his Motion for a Preliminary Injunction, Doe alleged that he had heard about a threat that had been experienced by another person in the community, but acknowledged that he had "no personal knowledge of whether such a threat had been made"; nor did he make any attempt to state the nature of the threat. Doc 3, Pgs 33-34.

Admittedly, Doe presented an affidavit from Elizabeth F. Beckemeyer who stated that she was afraid for her safety, but she, too, offered no evidence that she had been threatened with physical harm, but only by "boos" and similar verbal interruptions during a Barrow County Board of Commissioners meeting when she spoke out against the Ten Commandments picture at issue in this case. *See* Doc 15.

Notwithstanding the absence of any threats of physical harm, much less of threats of physical harm directed to Doe, the District Court considered and relied upon Doe's and Beckemeyer's affidavits to rule in favor of Doe's Motion to Proceed Anonymously. *See* Doc 21, Pgs 10-11. Yet, the District Court made no factual finding of a "real danger of physical harm," nor did it make any factual finding that the alleged threats were made, or, if made, that the threats created any risk to the physical safety of Doe or anyone else. *See* Doc 21, Pgs 10-11. Instead, the District Court found only that "Ms. Beckemeyer **stated** that she was afraid for her safety" and that "John Doe **stated** in his affidavit that ... he fears retaliation against both himself and his family." *See* Doc 21, Pg 11.

Just because Ms. Beckemeyer and Mr. Doe "stated" that they had certain fears did not discharge the District Court's duty to evaluate those statements according to the rule in *Doe v. Frank.* The *Frank* court emphasized that "[a] judge

should carefully review *all* the circumstances of a given case and then decide whether the customary practice of disclosing the plaintiff's identity should yield to the plaintiff's ... concerns." *Id.*, 951 F.2d at 323. The court below utterly failed to follow this rule, not even mentioning in its Order the existence of three declarations submitted by Barrow County, two of which directly contradicted portions of Ms. Beckemeyer's account of what happened to her at the Board meeting, upon which the court below relied. *Compare* Doc 13, Pgs 15-16, 25-26, 27-28, *with* Doc 21, Pgs 10-11.

Additionally, the court below did not even acknowledge Barrow County's argument at the hearing on December 11, 2003, that the audio recording of Ms. Beckemeyer's voice at the meeting referred to in her affidavit belied Ms. Beckemeyer's assertion in her affidavit (Doc 15, Pg 2) that she "started to shake because of my fear." Doc 40, Pg 25. Even though Barrow County counsel called the court's attention to the fact that this recording had been placed in the record in support of Doe's Motion for Preliminary Injunction (Doc 40, Pg 25), the District Court's Order contains nothing to indicate that the court listened to Ms. Beckemeyer's actual speech in order to make an independent assessment whether Ms. Beckemeyer's claim of fear for her safety contained in her affidavit was credible. *See* Doc 21, Pg 10-11.

According to what is contained in the written December 18, 2003 Order, then, the court below made absolutely no effort to comply with the *Frank* rule requiring consideration of **all** of the circumstances **before** deciding that plaintiff had produced sufficient evidence to override "the customary practice disclosing the plaintiff's identity." *See Frank*, 951 F.2d at 323.

Indeed, instead of tending to its duty to determine the "facts," the court below was content to override the customary practice of full disclosure because "[i]n the end, the court **feels** that this is one of those rare cases in which the plaintiff should be permitted to proceed anonymously" (*see* Doc 21, Pg 11), or because "in light of the [community] response, the court **feels** it appropriate to allow plaintiff to proceed under a pseudonym." *See* Doc 21, Pg 12 (emphasis added). The rule of *Doe v. Frank* requires that the decision of a trial court on the issue of anonymity be based upon **facts**, not **feelings**.

Moreover, the *Frank* court insisted that the issue of anonymity rest upon a "**real** danger of **physical harm**," not just some generalized concern about retaliation or intimidation. Not only did the court below disregard this standard by utterly failing to assess whether the Beckemeyer and Doe statements constituted such a danger, it also completely neglected that legal standard in its assessment of the alleged "attempts at intimidation" that it "note[d]" had been made by "at least

one member of the community" against him and his fellow judges. Doc 21, Pg 11. Characterizing these attempts as "angry and inappropriate voice messages," the trial judge made absolutely no effort to describe the contents of those messages, much less to assess whether they complied with the *Frank* standard of a "real danger of physical harm" to him and his fellow jurists, or to Doe.

Even at oral argument, when the court below initially revealed to counsel that he and his fellow judges received "some threatening letters and very vile ... telephone calls" (Doc 40, P 14), the District Court failed to identify the nature of the "threats" or to reveal anything about the nature of the language other than the curious observation that "it wasn't very Christian" and that it was "[un]repeat[able] because ... there are ladies in the courtroom." *See* Doc 40, Pg 16. While the court did suggest that the communications might possibly be violative of a federal criminal statute, the court also acknowledged that the terms of that statute were "very broad," extending to communications that did not create any real danger of physical harm. *See* Doc 40, Pg 15.

In sum, the District Court erred by disregarding the *Frank* rule that governs the exercise of discretion, and therefore, was erroneous as a matter of law. *See James v. Jacobson*, 6 F.3d 233, 240-41 (4th Cir. 1993). Moreover, by misapplying the clear rule of *Frank* requiring a "careful review of all the circumstances," the

court abused its discretion, committing clear error to the prejudice of Barrow County.

CONCLUSION

For the reasons stated, the District Court's December 18, 2003 Order — insofar as it denied Barrow County's Motion to Dismiss — should be reversed and remanded with instructions to dismiss Doe's Complaint without prejudice.

In the alternative, the District Court's Order — insofar as it granted Doe's Motion to Proceed Anonymously — should be reversed and remanded with instructions to enter an order denying Doe's motion, or in the alternative, should be reversed and remanded with instructions to conduct an appropriate evidentiary hearing on Doe's claim that he should be permitted to proceed anonymously, and to decide that claim according to the legal standard governing anonymous plaintiffs in this Circuit.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B), Federal Rules of Appellate Procedure, because this brief contains 8372 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

_____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this ___ day of March 2004, true and correct and sufficient copies of the foregoing Brief of Appellant were served on the following persons by first-class U.S. Mail, prepaid:

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