Record No. 140242

IN THE SUPREME COURT OF VIRGINIA

YELP, INC.,

Appellant,

v.

HADEED CARPET CLEANING, INC.,

Appellee

BRIEF *AMICUS CURIAE* IN SUPPORT OF APPELLANT YELP, INC. BY THREE YELP REVIEWERS WHOSE IDENTITIES APPELLEE SEEKS TO OBTAIN

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE INTERESTS OF *AMICI*

Amici are three individuals (the "Yelp Reviewers") whose identities Appellee Hadeed Carpet Cleaning, Inc. ("Hadeed") seeks to obtain through a subpoena to Yelp, Inc. in this matter.[1] Each of the Yelp Reviewers was a customer of Hadeed, and each posted a review of his or her experience with Hadeed on the public consumer review site Yelp.com. Each used a self-chosen screen name rather than his or her real name, in order to comment anonymously. Without such anonymity, the Yelp Reviewers may have never shared their experiences publicly for fear of retaliation by Hadeed. Such fear is justified given that Hadeed now seeks to obtain their identities simply because they shared their consumer views.

Pursuant to Virginia Supreme Court Rule 5:30(b)(2), this brief is submitted with the written consent of the parties. No counsel for any party authored any part of this brief.

[1] These three individuals are also potentially defendants: although Hadeed lists one corporate and two individual "John Doe" defendants in its Complaint, its subpoena seeks identifying information regarding the authors of seven separate reviews, each posted under a different screen name. The three Yelp Reviewers each posted one of the seven reviews identified in Hadeed's subpoena. Thus, none of the Yelp Reviewers can know if he or she is, or could be, one of the two individual "John Doe" defendants.

SUMMARY OF ARGUMENT

A divided Court of Appeals misread a Virginia statute – in which the General Assembly adopted a rigorous standard for granting subpoenas to unmask anonymous speakers – as allowing a plaintiff to achieve such disclosure simply by alleging vaguely that some statements *may be* tortious.[2] The statute, which the General Assembly enacted expressly to

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[2] Va. Code § 8.01-407.1 provides, in relevant part:

> A. In civil proceedings where it is alleged that an anonymous individual has engaged in Internet communications that are tortious, any subpoena seeking information held by a nongovernmental person or entity that would identify the tortfeasor shall be governed by the following procedure . . .
>
> 1. At least thirty days prior to the date on which disclosure is sought, a party seeking information identifying an anonymous communicator shall file with the appropriate circuit court a complete copy of the subpoena and all items annexed or incorporated therein, along with supporting material showing:
>
> a. That one or more communications that are or may be tortious or illegal have been made by the anonymous communicator, or that the party requesting the subpoena has a legitimate, good faith basis to contend that such party is the victim of conduct actionable in the jurisdiction where the suit was filed. A copy of the communications that are the subject of the action or subpoena shall be submitted.
>
> b. That other reasonable efforts to identify the anonymous communicator have proven fruitless.
>
> c. That the identity of the anonymous communicator is important, is centrally needed to advance the claim, relates to a core claim or defense, or is directly and materially relevant to that claim or defense.
>
> * * *
>
> e. That the individuals or entities to whom the subpoena is addressed are likely to have responsive information.

protect the confidentiality of anonymous online speakers' identities, requires a party seeking to unmask such a speaker to make an enhanced showing that the communications at issue "are or may be tortious or illegal . . . or that the party requesting the subpoena has a legitimate, good faith basis" for its claim. Va. Code § 8.01-407.1(A)(1)(a). A divided Court of Appeals panel rendered the statute nearly meaningless by (1) improperly assuming that the reviews at issue constitute commercial speech, (2) holding that the statute's requirements were satisfied by nothing more than Hadeed's untested and unsupported allegation that the reviewers *may* not have been customers, and (3) ignoring other flaws in Hadeed's pleadings.

The majority's construction minimizes the Constitutional protections afforded to anonymous speech in a manner that is inconsistent not only with Virginia law but also with the First Amendment and national precedent regarding the unmasking of online anonymous speakers. If such a rule is allowed to stand, Virginia will fall out of step with national protections for online speech and the Commonwealth will see an increasing number of lawsuits that amount to nothing more than fishing expeditions to gain identifying information first, and which may or may not ever proceed as genuine attempts to obtain legal remedies for actually tortious conduct by

anonymous speakers. *Amici* respectfully submit that the decision by the Court of Appeals should be reversed, and the subpoena *duces tecum* quashed.

ARGUMENT

I. ANONYMOUS ONLINE CONSUMER SPEECH IS ENTITLED TO THE FULL PROTECTION OF THE FIRST AMENDMENT

Anonymous commentators for centuries have advocated for political, social, cultural and economic change; criticized and satirized the powerful; and ushered initially unconventional ideas into the mainstream. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995); *Talley v. California*, 362 U.S. 60, 64-65 (1960). As many courts have noted, the Federalist Papers were published pseudonymously, and there is perhaps no better illustration of the reasons why the First Amendment protects citizens' rights to speak their minds without revealing their identities. *Id.*; *see also Jaynes v. Com.*, 276 Va. 443, 461 (2008) (recognizing that First Amendment protects right to anonymous speech generally and anonymous online speech specifically).

The Internet and other digital communications technologies may have conferred upon ordinary people the ability to speak to and be heard by a far larger audience than the Framers ever could have imagined, and for new purposes, but these technologies have not displaced the right of freedom of

expression from its preeminent position in our law. *Id.; Reno v. ACLU*, 521 U.S. 844, 870 (1997) (affirming that First Amendment protections apply fully to online speech). Among the many reasons that people might choose to exercise their right to speak anonymously is a "fear of economic . . . retaliation," *McIntyre*, 514 U.S. at 341-42 – a reason common to consumer commenters like the Yelp Reviewers.

The Court of Appeals substantially minimized the First Amendment interests at stake in this case by characterizing the online consumer reviews at issue as "commercial speech" entitled to a lesser degree of First Amendment protection. *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 62 Va. App. 678, 692 (2014) (hereinafter, "Op.") (contending that it is "difficult to conceive" how the Yelp reviews could be read as "anything other than" commercial speech). Apparently, the Court of Appeals believed that the reviews had a commercial purpose because they discussed a commercial transaction, *i.e.*, Hadeed's carpet cleaning service. But this was a leap in logic contrary to well-established law. The Yelp reviews at issue here are plainly *consumer speech*, which is fully protected by the First Amendment, rather than commercial. Although the U.S. Supreme Court has not adopted an all-purpose test for commercial speech, it has said speech that does no more than propose a commercial transaction falls "within the core notion of

commercial speech." *City of Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 422 (1993) (quoting *Bolger v. Youngs Drug Corp.*, 463 U.S. 60, 66 (1983)). The reviews at issue here plainly cannot be characterized as commercial speech on this basis: none of them proposes any commercial transaction at all. Compl. Ex. 6. In *Bolger,* the Supreme Court identified three factors relevant to determining whether particular speech is commercial or noncommercial: (1) whether the communication is an advertisement, (2) whether the communication makes reference to a specific product, and (3) whether the speaker has an economic motivation for the communication. 463 U.S. at 66-67; *see also Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626, 637 (1985) ("The commercial speech doctrine rests heavily on the common sense distinction between speech proposing a commercial transaction . . . and other varieties of speech.").

None of the indicia of commercial speech is present here. A *bona fide* Yelp review, detailing a customer's experience with a particular business, is not an advertisement – it in no manner seeks to sell anything. Although the posts reference a service, "simply because the speech . . . references a specific product . . . does not necessarily mean that it is commercial speech." *Hunter v. Virginia State Bar ex rel. Third Dist. Committee*, 285 Va. 485, 496 (2013). And the referenced product, of

course, is not the *commenter's*. Finally, while there may be some arguable economic interest to an aggrieved consumer in complaining about poor service, such speech manifestly does not seek to solicit sales or represent a business aim, especially when done anonymously. The Yelp Reviewers were on their face not engaged in commerce in writing their reviews, and their statements did not propose any commercial transaction. Theirs is speech *discussing* a monetary transaction, core consumer speech.

The Virginia Supreme Court's decision in *Hunter* demonstrates the differences between the Yelp reviews here and actual commercial speech. In *Hunter*, the Court held that an attorney's online blog posts were "commercial speech" where the attorney admitted that his motivation for blogging was in part economic, where the posts predominately touted legal cases where he had received a favorable result for his client, where the blog was on his law firm's commercial website, where the site was non-interactive and did not permit readers to post comments, and where it simply invited readers to "contact us" the same way one seeking legal representation would contact the firm. Here, in contrast, Hadeed never contended, and the Court of Appeals did not find, that the reviews were an advertisement or proposed any commercial transaction akin to the solicitation for services in *Hunter*.

Moreover, the Virginia subpoena statute makes no distinction between commercial speech and other types of speech. Va. Code § 8.01-407.1(A) (statute applies to all "civil proceedings where it is alleged that an anonymous individual has engaged in Internet communications that are tortious"). As such, the Court of Appeals improperly undervalued the speech interests at stake by mischaracterizing the online posts at issue as commercial speech subject to lesser guarantees of anonymity. *Jaynes*, 276 Va. at 464 (holding that a statute "cannot be rewritten," and finding that "[s]uch a task lies within the province of the General Assembly, not the courts."); *see also Jackson v. Fidelity & Deposit Co.,* 269 Va. 303, 313 (2005) ("Where the General Assembly has expressed its intent in clear and unequivocal terms, it is not the province of the judiciary to add words to the statute or alter its plain meaning.").[3]

At bottom, therefore, there is no weakened protection for consumer speech of the type at issue, and Hadeed therefore cannot make the showing properly required under the statute.

[3] Even if the reviews constituted commercial speech they nevertheless would still be fully protected by the First Amendment because any commercial aspects of the speech are "inextricably intertwined" with protected non-commercial speech. *Riley v. Nat'l Fed'n of the Blind,* 487 U.S. 781, 782 (1988) (speech does not "retain its commercial character when it is inextricably intertwined with otherwise fully protected speech").

A. The General Assembly Intended and Adopted a Speech-Protective Standard

The language and history of Va. Code § 8.01-407.1 show that it was intended to provide more robust protection for the rights of citizens to speak anonymously online than either the Circuit Court or Court of Appeals provided. The General Assembly's stated goal was to protect online speech rights by "creating a presumption of confidentiality of [the] identity of anonymous communicators." H.B. 819, Va. Gen. Assembly (Reg. Sess. 2002). The statute sets forth a procedure for providing an online speaker with notice and an opportunity to be heard, and, more importantly, requires an *enhanced showing* of the legitimacy of the underlying action. Va. Code § 8.01-407.1(A)(1)(a) (requiring the filing of supporting material showing "[t]hat one or more communications that are or may be tortious or illegal have been made by the anonymous communicator, or that the party requesting the subpoena has a legitimate, good faith basis to contend that such party is the victim of conduct actionable in the jurisdiction where the suit was filed.").

The purpose of this requirement of an enhanced showing is easy to trace. The legislation that became § 8.01-407.1 arose from a report by the Office of the Executive Secretary of this Court requested by a 2001 joint resolution of the General Assembly. S. Doc. No. 9, at 1 (2002). The

Executive Secretary's report began by stressing the need to protect against the threatened chilling effect on speech caused by "the proliferation of lawsuits and subpoenas aimed at identifying Internet communicators." *Id.* "In view of this threat," the report continued, "it is incumbent upon the Commonwealth and its courts to apply a ***rigorous standard*** to ensure that '[p]eople who have committed no wrong [can] participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identity.'" *Id.* at 1-2 (quoting *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999)) (emphasis added). The legislation's presumption of confidentiality is grounded in the First Amendment: "The anonymity of a communicator on the internet is presumed to be Constitutionally protected at the outset." *Id.* at 44. That premise "places the burden of producing ***some evidence*** on the shoulders of the party who would pierce that protection." *Id.* n.192 (emphasis added).

As enacted by the General Assembly, Section 8.01-407.1 is nearly identical to the legislation proposed in the Executive Secretary's report. *Compare id.*at 51-55 *with* Va. Code § 8.01-407.1. Thus, the General Assembly intended to protect anonymous speakers from being unmasked in frivolous actions by enacting a "rigorous standard" for granting

subpoenas allowing discovery of identifying information. The legislation's prefatory language also shows that the General Assembly intended the analysis of requests for such subpoenas to start with the baseline presumption that the speaker's identifying information is confidential. H.B. 819, Va. Gen. Assembly (Reg. Sess. 2002). As the General Assembly obviously recognized, the most effective way to harmonize a plaintiff's need to pursue meritorious claims with the anonymous speaker's right to voice her views without exposing her identity is to require the plaintiff to make a *prima facie* evidentiary showing of merit for every element of a cause of action for which evidence is within a plaintiff's control.

If the claim is defamation, for example, the plaintiff should be required to present *prima facie* evidence that the statement was published, is about the plaintiff, is false, and is defamatory. *Jordan v. Kollman*, 269 Va. 569, 575 (2005) (describing elements of defamation tort under Virginia law); *see also infra* at 25-26 (describing Constitutional limitations on defamation claims). To show that challenged speech is defamatory, the plaintiff would have to provide evidence that the statement either falls within one of the categories of defamation *per se* or that the statement is damaging to reputation and plaintiff suffered special damages as a result of it. *The Gazette, Inc. v. Harris*, 229 Va. 1, 8 (1985). Whether a statement is

capable of a defamatory meaning is a question of law for the court to determine. *Webb v. Virginian-Pilot Media Cos., LLC*, 287 Va. 84 (2014). Thus, the reasonable interpretation of Section 8.01-407.1 is that a plaintiff must show that the statement is actionable as a matter of law in order to obtain an unmasking subpoena. In other words, a plaintiff cannot meet his or her burden to show that challenged statements "are or may be tortious" if those statements are not defamatory as a matter of law, nor could a plaintiff demonstrate a legitimate, good faith basis to believe there is a viable claim if the statements are not actionable as a matter of law. *See id.* ("Ensuring that defamation suits proceed only upon statements which actually may defame a plaintiff, rather than those which merely may inflame a jury to an award of damages, is an essential gatekeeping function of the court.").

Moreover, the statute's requirement that, if a plaintiff cannot show that the statements "are or may be tortious," it must show that it has a "legitimate, good faith basis" for its claims, must necessitate at least *some* evidentiary showing. Va. Code § 8.01-407.1(A)(1)(a). Otherwise, *any* signed complaint – which is presumed to have a good faith basis in fact and law under Va. Code § 8.01-271.1 – would be sufficient to meet the good faith requirement, as the Fairfax County Circuit Court recently observed. *Geloo v. Doe*, 2014 WL 2949508, at *5 (Va. Cir. Ct. June 23,

2014). Thus, something more than the mere *ipse dixit* of the plaintiff must be presented, or else the courts would be indulging in "casual disregard of a fundamental right," *id.* and the statute would always be satisfied and therefore a nullity.

B. A 'Rigorous' Virginia Standard is in Line With the National Consensus Regarding Protections for Anonymous Online Speakers Against Subpoenas Seeking Identifying Information

Virginia is not an outlier in enacting a statute aimed at providing strong protection to anonymous speech. The consensus among courts nationally supports such protections. Since the issue of unmasking online anonymous speakers first surfaced in Virginia in 2000, *In re Subpoena Duces Tecum to Am. Online, Inc.*, 52 Va. Cir. 26 (2000), courts in more than a dozen states have addressed the standard to be applied when a plaintiff seeks discovery to identify the author of allegedly tortious online speech. *See, e.g.*, *Pilchesky v. Gatelli*, 12 A.3d 430, 441 (Pa. Super. Ct. 2011) (collecting cases); *see generally* Ashley I. Kissinger, Katharine Larsen & Matthew E. Kelley, *Protections for Anonymous Online Speech*, *in* 2 COMMUNICATIONS LAW IN THE DIGITAL AGE 2013 721, 737-49 (Practising Law Institute 2013). The overwhelming majority of these courts has concluded that the First Amendment requires plaintiffs seeking to unmask anonymous online speakers to submit sufficient evidence to establish at

least a *prima facie* case – in other words, to show that the action is not baseless. *Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231, 244-45 (Cal. Ct. App. 2008) ("Common to most courts considering the issue is the necessity that the plaintiff make a *prima facie* showing that a case for defamation exists."); *Koch Indus., Inc. v. Does*, 2011 WL 1775765, at *10 (D. Utah May 9, 2011) ("Although courts have adopted slightly different versions of the test, '[t]he case law . . . has begun to coalesce around the basic framework'" requiring, *inter alia*, a showing of the underlying litigation's merit) (citing *SaleHoo Grp., Ltd. v. ABC Co.*, 722 F. Supp. 2d 1210, 1214 (W.D. Wash. 2010)).[4]

Courts generally require that a plaintiff attempt to notify the anonymous speaker and give that person an opportunity to respond; identify the precise online statements alleged to be actionable; and present evidence demonstrating the viability of the claim, with some states recognizing a requirement that the court balance the speaker's First

[4] *See also Ghanam v. Does*, 845 N.W.2d 128 (Mich. App. 2014); *In re Indiana Newspapers, Inc.*, 963 N.E.2d 534 (Ind. App. 2012); *Mortgage Specialists, Inc. v. Implode-Explode Heavy Industries, Inc.*, 999 A.2d 184 (N.H. 2010); *Solers, Inc. v. Doe*, 977 A.2d 941 (D.C. 2009); *Mobilisa, Inc. v. Doe*, 170 P.3d 712 (Ariz. App. 2007); *In re Does 1-10*, 242 S.W.3d 805 (Tex. App. 2007); *Doe v. Cahill*, 884 A.2d 451 (Del. 2005); *Dendrite Int'l, Inc. v. Doe No. 3*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001); Ashley I. Kissinger, Katharine Larsen & Matthew E. Kelley, *Protections for Anonymous Online Speech*, *in* 2 COMMUNICATIONS LAW IN THE DIGITAL AGE 2013 721, 740-49 (Practising Law Institute 2013).

Amendment rights against the plaintiff's rights to seek redress. *See, e.g.*, *Pilchesky*, 12 A.3d at 439-46 (describing and analyzing other states' tests); *Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432, 449-57 (Md. 2009) (same); *see also* Matthew Mazzotta, *Balancing Act: Finding Consensus on Standards for Unmasking Anonymous Internet Speakers*, 51 B.C. L. Rev. 833, 847-48 (2010) (concluding that courts are in "general agreement" on requirements for notification and "an evidentiary showing on the merits of the plaintiff's claim," but "substantially less agreement" on what other factors courts should consider). Here, the statutory notice requirements are not at issue.

The heart of this framework – and where it differs from the application of Va. Code §8.01-407.1 by the Circuit Court and Court of Appeals – is the requirement that the plaintiff make a *prima facie* showing of its claims. As a California appellate court observed, this is the *minimum* necessary under the First Amendment, because "[r]equiring at least that much ensures that the plaintiff is not merely seeking to harass or embarrass the speaker or stifle legitimate criticism." *Krinsky*, 72 Cal. Rptr. 3d at 245. Thus, as other courts have recognized, a plaintiff seeking discovery of the identity of an anonymous online speaker must provide sufficient evidence to make a preliminary showing of merit on each element of its cause of action. *E.g.*,

Brodie, 966 A.2d at 456; *Dendrite Int'l, Inc. v. Doe No. 3*, 775 A.2d 756, 760-61 (N.J. Super. Ct. App. Div. 2001). This requirement should apply only to those elements for which the plaintiff would be presumed to have evidence; *prima facie* evidence to show the putative defendant's mental state, for example, need not be presented. *Doe v. Cahill*, 884 A.2d 451, 457 (Del. 2005).

To be sure, this places a burden on a plaintiff seeking to abridge the First Amendment right to speak anonymously. But this burden is necessary precisely because the menace of unfounded litigation is effective at producing its intended result: chilling the speech of anyone who dares to criticize those with the resources to pursue lawsuits regardless of their merit (or lack thereof). *Id.* ("The possibility of losing anonymity in a future lawsuit could intimidate anonymous posters into self-censoring their comments or simply not commenting at all."). Requiring a *prima facie* showing does not equate with a final decision on the merits. But it does ensure that the court engages in review so that an anonymous speaker's First Amendment rights are not usurped by wholly untested assertions.

Indeed, many courts have expressed concern that low-burden tests such as "good faith," without more, provide far too little protection to satisfy the First Amendment's requirements. *E.g.*, *Krinsky*, 72 Cal. Rptr. 3d at 241

(rejecting "good faith" standard because "it offers no practical, reliable way to determine the plaintiff's good faith and leaves the speaker with little protection."); *In re Does 1-10*, 242 S.W.3d 805, 821 (Tex. App. 2007) ("We cannot agree that [a good-faith test] is sufficient to survive any form of constitutional balancing.").[5]

II. PROTECTION FOR ANONYMOUS SPEECH IS VITAL FOR CONSUMER REVIEWERS

A. Review Sites Provide Valuable Information for Consumers and Businesses

Internet fora are venues where citizens such as the Yelp Reviewers may participate and be heard in free debate involving civic concerns. It may be said that such fora are the newest iteration of the town meeting. Courts elsewhere have repeatedly recognized that the First Amendment protects the right to participate in online fora anonymously or under a pseudonym, and that anonymous speech can foster the free and diverse

[5] Only a few courts, mostly at the trial level, have required a lesser showing where expressive (rather than allegedly intellectual property-infringing) speech is involved. *See, e.g.*, *Faconnable USA Corp. v. John Does 1-10*, 2011 WL 2015515, at *5-6 (D. Colo. May 24, 2011), *vacated*, 799 F. Supp. 2d 1202 (D. Colo. 2011) (applying "good cause" standard and denying motion to quash); *Klehr Harrison Harvey Branzburg & Ellers, LLP v. JPA Dev., Inc.*, 2006 WL 37020, at *8-9 (Pa. Com. Pl. Jan. 4, 2006) (holding that "existing procedural rules are adequate to protect anonymous poster's [sic] First Amendment rights"); *La Societe Metro Cash & Carry France v. Time Warner Cable*, 2003 WL 22962857, at *7 (Conn. Super. Ct. Dec. 2, 2003) (applying "good faith" standard in approving bill of discovery for online speaker's identifying information).

exchange of ideas. *See supra* at 4-5. Review websites such as Yelp, Angie's List, TripAdvisor, and Priceline.com provide platforms for consumers to share their experiences – good and bad – and for businesses to learn about their strengths and shortcomings. *See, e.g.*, *Edwards v. D.C.*, --- F.3d ---, 2014 WL 2895938, at *8 (D.C. Cir. June 27, 2014) (noting that "numerous consumer review websites, like Yelp and TripAdvisor . . . provide consumers a forum to rate the quality of their experiences" and suggesting that because "bad reviews are bad for business," such websites provide a better market regulatory mechanism than city's licensing scheme for tour guides). Like Yelp, some sites include reviews of a broad range of businesses from across the country, while others are more specialized, such as TripAdvisor for hotels and Avvo for attorneys.

As the popularity and scope of consumer review websites has grown, online reviews "have become an important and powerful decision-making resource for consumers." Sun-Young Park & Jonathan P. Allen, *Responding to Online Reviews: Problem Solving and Engagement in Hotels*, 54 Cornell Hospitality Quarterly 64, 65 (2013). Businesses, as well, have found value in online review sites. *See* Ron Lieber, *The Web Is Awash in Reviews but Not for Doctors. Here's Why*, N.Y. Times (Mar. 10, 2012) ("[O]ne thing is certain: a robust ecosystem exists online for

restaurant and hotel reviews that has changed those industries for the better."). Online reviews provide businesses with valuable feedback, insight into consumer preferences, and opportunities to solve problems or soothe consumers who have had less-than-optimal experiences. Park & Allen at 70-72; *see also* Kaitlin A. Dohse, *Fabricating Feedback: Blurring the Line Between Brand Management and Bogus Reviews*, U. Ill. J.L. Tech. & Pol'y, Fall 2013, at 363, 369-70. Indeed, Hadeed admits that when it saw the negative reviews, it contacted Yelp to "tr[y] to respond to" them. Compl. ¶ 12.

Like other speakers who choose to shield their identities, people who post reviews on Yelp have a variety of reasons to desire anonymity. Some may want to reduce the chance of receiving unwanted or harassing email or other digital messages. Others may not wish their friends or neighbors to know which businesses they frequent. Some may simply value their privacy. Here, the Yelp Reviewers certainly wanted to avoid the anxiety, expense and inconvenience of being dragged into court by a business that, instead of working to improve its service in response to consumers' complaints, chooses to sue its unhappy customers.

Readers and courts alike understand that, as with a newspaper's restaurant or music reviews, postings on websites such as Yelp consist

primarily of opinions rather than dry descriptions of objective facts. *See, e.g.*, *Seaton v. TripAdvisor LLC*, 728 F.3d 592, 598-99 (6th Cir. 2013) (reasonable readers would understand "top ten" list derived from reviews on TripAdvisor was "communicating subjective opinions of travelers who use TripAdvisor"); *Loftus v. Nazari*, 2014 WL 1908812, at *3 (E.D. Ky. May 13, 2014) (patient's online reviews of physician "were posted on opinion websites; therefore, the natural tendency would be to infer that they are opinion"); *Brompton Bldg., LLC v. Yelp!, Inc.*, 2013 IL App (1st) 120547-U, 41 Media L. Rep. 1476, at ¶¶ 28-30 (unpublished and nonprecedential) (tenant's Yelp review regarding landlord, in context, consisted of statements of opinion, not actionable statements of fact); *Intellect Art Multimedia, Inc. v. Milewski*, 899 N.Y.S.2d 60 (table), 2009 WL 2915273, at *5 (N.Y. Sup. Ct. N.Y. Cnty. 2009) (defendant's "subjective expressions of consumer dissatisfaction with plaintiff" are "not actionable because they are Milewski's personal opinion.").[6]

[6] Indeed, a marketing firm survey last year found that most readers of online reviews take them with a healthy grain of salt, discounting reviews that are overly positive or negative or that otherwise appear "fake" or planted. DAVID ENSING, CUSTOMER RATING AND REVIEWS SITE: AN UPCOMING CRISIS OF CONFIDENCE? (2013), http://www.maritzresearch.com/~/media/Files/MaritzResearch/Whitepapers/Customer-Rating-and-Reviews-Site_rev.pdf (reporting results of survey finding most users of online rating sites consider the information presented to be mostly fair but those users are skeptical of some reviews).

B. Once Anonymity Is Lost, It Cannot Be Regained

Defamation and other tort actions against reviewers and similar anonymous online speakers carry the very real danger of becoming a venue for nothing more than retaliation by thin-skinned subjects of legitimate criticism – a danger explicitly recognized by the report recommending the legislation that became Va. Code §8.01-407.1. S. Doc. No. 9 at 1 (pretextual lawsuits to uncover speakers' identities "encourage undue self-censorship among the other John Does who frequent Internet discussion fora.") (citation omitted).

Courts likewise have expressed concern that actions against online speakers may sometimes be aimed more at shutting up critics than winning legal redress for actual wrongs. *E.g.*, *Cahill*, 884 A.2d at 457 ("After obtaining the identity of an anonymous critic through the compulsory discovery process, a defamation plaintiff who either loses on the merits or fails to pursue a lawsuit is still free to engage in extra-judicial self-help remedies; more bluntly, the plaintiff can simply seek revenge or retribution."); *Rancho Publications v. Superior Court*, 81 Cal. Rptr. 2d 274, 280 (Cal. Ct. App. 1999) (observing that, where anonymous speech is involved, "the threats to liberty may be more severe in a discovery context, since the party directing the inquiry is a litigation adversary who may well

attempt to harass his opponent and gain strategic advantage by probing deeply into areas which an individual may prefer to keep confidential") (internal quotations omitted).

Underlining this concern is the fact that, once lost, anonymity can never be regained – which is one of the motivating factors for courts that have adopted *prima facie* tests for unmasking subpoenas. *See SaleHoo*, 722 F. Supp. 2d at 1214-15 (weight of authority favors high-burden tests because they "assess the viability of [the plaintiff's] claims before casting aside [defendants'] anonymity, which once lost cannot be recovered"). As one federal court put it:

> The free exchange of ideas on the Internet is driven in large part by the ability of Internet users to communicate anonymously. If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights. Therefore, discovery requests seeking to identify anonymous Internet users must be subjected to careful scrutiny by the courts.

Doe v. 2TheMart.com Inc., 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001).

C. Courts Regularly Protect the Anonymity of Online Consumer Reviewers

In light of the speech interests at stake, many courts have rejected discovery requests for identifying information regarding anonymous online speakers in circumstances similar to this case. *See, e.g.*, *Foda v. Capital Health*, 2010 WL 2925382, at *2 (N.D. Cal. July 26, 2010) (denying application for subpoena under 28 U.S.C. § 1782 for identity of reviewer at RateMDs.com); *Brompton*, 2013 IL App (1st) 120547-U, at ¶ 2 (unpublished decision affirming trial court's denial of petition for pre-suit discovery of Yelp reviewer's identity). For example, the New Hampshire Supreme Court held that the *Dendrite prima facie* standard and balancing test should be used to determine whether to allow discovery of the identity of people who posted comments critical of the plaintiff mortgage firm to a mortgage industry rating website. *Mortgage Specialists, Inc.*, 999 A.2d 184, 193 (2010). Likewise, a federal court applied a "*Dendrite*-style test" in quashing a subpoena seeking to identify the person behind an "internet gripe site" devoted to criticizing the plaintiff corporation, holding that the plaintiff had not pleaded viable trademark infringement or defamation claims. *SaleHoo*, 722 F. Supp. 2d at 1217-18.

Similarly, many courts have quashed subpoenas for identifying information regarding anonymous posters to websites devoted to

discussions of publicly-traded companies. *Dendrite*, for example, involved just such a factual situation. 884 A.2d at 762. The California Court of Appeal noted the potential of "cybersmears" to damage a company's reputation and stock price, but nevertheless held that the First Amendment requires that courts protect the anonymity of commenters denigrating a corporation and its leadership absent a *prima facie* showing of merit to the claims against them. *Krinsky*, 72 Cal. Rptr. 3d at 238-46. For the same reason, an Ohio federal court dismissed a defamation case without ordering identification of the anonymous poster of the statements at issue, holding that they were nonactionable opinion in part because they included hyperbolic and figurative language such as "TIMBER!!!!!" and "cooking the books" and thus could not be considered "professional investment advice." *SPX Corp. v. Doe*, 253 F. Supp. 2d 974, 981 (N.D. Ohio 2003). Further, the court in *SPX* held that the fact that the postings were made in a Yahoo forum accessible to anyone where "[p]seudonym screen names are the norm" meant that a reasonable reader "would not view the blanket, unexplained statements at issue as 'facts.'" *Id.*

III. THE DECISION BELOW UNDERVALUES ANONYMOUS SPEECH BY PERMITTING DISCOVERY DESPITE A FACIALLY INSUFFICIENT SHOWING

Because of their effect on speech about important matters of public concern, defamation claims are circumscribed by the constitution and common law of Virginia, as well as by the First Amendment to the U.S. Constitution. *See Chaves v. Johnson*, 230 Va. 112, 119 (1985) ("[A]rticle 1, section 12 of the Constitution of Virginia protect[s] the right of the people to teach, preach, write, or speak any such opinion, however ill-founded, without inhibition by actions for libel and slander."). To protect public debate and safeguard freedom of speech and the press, courts have long recognized the strict requirements that a plaintiff must meet in order to avoid dismissal of a claim for defamation. To state a claim for defamation under Virginia law, a plaintiff must allege: "(1) publication [by the defendant] (2) of an actionable statement with (3) the requisite intent." *Jordan*, 269 Va. at 575. The burden to allege and prove falsity is on the plaintiff in all cases. *Harris*, 229 Va. at 15.

Moreover, because the defense of baseless defamation claims imposes an additional cost, in the form of potentially deterred speech, courts historically have given close scrutiny to pleadings in libel actions. As a result, courts in Virginia routinely dismiss at the outset defamation claims

that are based on constitutionally protected speech. *See, e.g.*, *Yeagle v. Collegiate Times*, 255 Va. 293, 295 (1998) (affirming dismissal of libel claim "subject to principles of freedom of speech arising under the First Amendment"); *Biospherics, Inc. v. Forbes, Inc.*, 151 F.3d 180, 182 (4th Cir. 1998) (affirming dismissal of libel claim "[b]ecause the challenged statements are constitutionally protected"); *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1091-92 (4th Cir. 1993) (same).

A. The Court of Appeals Erred in Presuming the Speech to be Unprotected

While defamatory language enjoys little First Amendment protection, the Court of Appeals placed the cart before the horse. The Court of Appeals *presumed* that the reviews are unprotected speech *if* they were not written by actual customers, without requiring plaintiff to put forth some support for its suggestion that the claims might be authored by non-customers (apparently simply because Hadeed could not correlate *anonymous* posters with any of its thousands of actual customers), or evidence that any specific statements are substantively false. *See* Op., 62 Va. App. at 705 (contending that if "the reviewer was never a customer of a business, then the review is not an opinion; instead, the review is based on a false statement of fact –that the reviewer is writing his review based on personal experience. And 'there is no constitutional value in false

statements of fact.'") (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)). However, for purposes of the First Amendment, it simply does not matter that Hadeed vaguely, and in fact only implicitly, alleges in its Complaint that the reviews are false. Indeed, as the United States Supreme Court reaffirmed recently in *United States v. Alvarez*, 132 S. Ct. 2537 (2012), the First Amendment prohibits the enactment of laws that empower either government or its citizens to punish speech merely because it is *alleged* to be false. *See id.* at 2545 ("The Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection."). Furthermore, it is not the court's duty to ensure the absolute purity of public discourse. *See id.* at 2547 ("Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth. *See* G. Orwell, Nineteen Eighty–Four (1949) . . . ."). As the Supreme Court explained, the "mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom." *Id.* at 2548.[7]

[7] Moreover, as articulated by Yelp in its briefing below, even if it is true that Hadeed did not overcharge any of the customers who wrote the posts Hadeed seeks to uncover, if there is a general problem of overcharging or providing poor service to Hadeed's other customers, the

Judge Haley's dissent in the decision below makes exactly this point. In dissenting from the majority's view that the evidence proffered in support of the subpoena was sufficient, Judge Haley noted that "nowhere in this cause has Hadeed claimed that any of the substantive statements are false. Rather, Hadeed maintains, these communicators *may not* have been customers, and, if they were not, the substantive statements may be tortious." Op., 62 Va. App. at 711 (Haley, J., dissenting) (emphasis added). Further, "[a] business subject to critical commentary, commentary here not even claimed to be false in substance, should not be permitted to force the disclosure of the identity of anonymous commentators simply by alleging that those commentators may not be customers because they cannot identify them in their database." *Id.* at 26. As noted above, *amici*, three Yelp Reviewers, are in fact customers of Hadeed. Without satisfying the strict constitutional requirements that govern a defamation claim against these individuals, plaintiff's request to disclose their identities must fail.

At bottom, Hadeed's assertion that the reviews lose their First Amendment protection because they allegedly contain false statements only *if* the reviewers were not customers—which at least three are—circumvents decades of jurisprudence that has substantially narrowed

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gist or sting of the Does' statements are nevertheless true and they are therefore not actionable.

claims for defamation largely pursuant to the proposition that "erroneous statement[s] [are] inevitable" in public discourse and "must be protected if the freedoms of expression are to have the breathing space that they need to survive." *See New York Times v. Sullivan*, 376 U.S. 254, 271-72 (1964) (protecting good faith statements about public officials even if false); *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 778 (1986) ("'The First Amendment requires that we protect some falsehood in order to protect speech that matters,'" and requires plaintiffs to prove falsity in most cases (citation omitted)); *United States v. Alvarez*, 638 F.3d 666, 670 (9th Cir. 2011) (Smith, J., concurring in denial of rehearing petition) (courts give "'near absolute protection . . . to false but nondefamatory statements of fact outside the commercial realm'" (quoting Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 477 (1996)); *Gertz*, 418 U.S. at 349 (limiting presumed and punitive damages in libel cases); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (imposing similar protections in other tort claims arising from protected speech).

B. Hadeed's Subpoena Should Be Quashed Because its Complaint Is Inadequate as a Matter of Law

The subpoena was also improperly granted because both the Circuit Court and the Court of Appeals overlooked additional, fatal defects in

Hadeed's pleadings, defects that preclude it from meeting its burden of demonstrating a *prima facie* case. These defects warrant independent review by this Court. *See Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984).

1. The Court Improperly Assumed That The Yelp Reviewers Are Defendants

Both lower courts assumed, erroneously, that the seven reviewers that Hadeed seeks to identify are defendants in this case. *See* Op., 62 Va. App. at 706 (referring to "the seven Doe *defendants'* reviews") (emphasis added); *Hadeed Carpet Cleaning Inc., v. Doe No.* 1, 86 Va. Cir. 59, 2012 WL 10646652, at *1 (Va. Cir. Nov. 19, 2012) (stating subpoena sought identifying information regarding "defendants, John Does"). But Hadeed *did not* name seven John Doe defendants. It named three: "John Doe #1" and "John Doe #2," plus a corporate entity, "John Doe Company." *See* Compl. ¶ 2.

Because Hadeed has not alleged which of the seven reviewers is John Doe #1 or John Doe #2 or John Doe Company, Hadeed's subpoena is not in compliance with the statutory framework for unmasking putative defendants. Hadeed did not and cannot show either that the *defendants* made any tortious statement (because the Complaint does not allege that the particular defendants are responsible for any one of the seven

challenged reviews, *see* Compl. ¶¶ 16-18, 20-24) or that the Yelp Reviewers' identities are "important[], centrally needed to advance the claim, relate[] to a core claim or defense, or [are] directly and materially relevant to that claim or defense." Va. Code § 8.01-407.1(A)(1)(a), (c). Similarly, in the supporting material it submitted to the Circuit Court under Section 8.01-407.1, Hadeed states "[u]pon information and belief" that the seven Yelp reviews were written by the defendants, but it again does not link any specific review with any specific defendant. Notice of Filing Supporting Material ¶ 6. The Yelp Reviewers cannot be stripped of constitutionally protected rights to anonymous speech based upon such inadequate pleadings.

2. Hadeed's Complaint Does Not Comply With Virginia Law

Because it fails to identify claims against particular defendants, Hadeed's Complaint does not comply with Virginia law requiring a plaintiff who is unable to name a defendant to "furnish such salient facts as are calculated to identify with reasonable certainty such defendant." Va. Code § 8.01-290; *see also* Va. Sup. Ct. R. 3:2(b) ("The requirements of Code § 8.01-290 may be met by giving the address or other data after the name of each defendant."). Here, the salient facts available to Hadeed unquestionably included, at the very least, the screen name and purported

hometown of each of the seven Yelp reviewers targeted in the subpoena. Hadeed did not provide that information in its Complaint. Not only does this create uncertainty regarding whether Hadeed will ultimately sue any of the seven Yelp Reviewers, and if so which two (or three, if one is a company), but as a result neither the Court nor the Yelp Reviewers can glean *any* salient facts from the Complaint – let alone enough to identify any John Doe defendant as the author of any one of the allegedly defamatory reviews.[8]

The Maryland Court of Appeals confronted a similar situation in *Brodie*. There, the plaintiff sued a newspaper and three John Doe commenters who posted messages to its website regarding the burning of a historical home by its new owners after the plaintiff sold it. *Brodie*, 966 A.2d at 442-44. The plaintiff also alleged in his complaint that the newspaper had published defamatory remarks regarding the plaintiff's donut business, but did not identify the screen names of those commenters

[8] Identifying which specific statements are allegedly actionable is a minimum requirement to withstand a demurrer. *Fuste v. Riverside Healthcare Ass'n, Inc.*, 265 Va. 127, 134 (2003). Multiple statements in the reviews Hadeed lists in its subpoena are classic non-actionable opinion, such as, just by way of example, "Certainly wouldn't use them again and never recommend them", "BE WARNED", "Do not use this company!", "This is an awful business", "Beware folks", "I advise others to proceed with caution!", "Lots of hype, mediocre cleaning, and a hassle at the end", "BEWARE!". *See* Compl. Ex. 6.

or name them as Doe defendants. *Id.* The trial court dismissed the newspaper as a defendant and quashed subpoenas for the identities of the three Doe commenters, holding that their comments were not about the plaintiff. *Id.* at 445. However, the trial court ordered the newspaper to provide identifying information about two anonymous commenters the plaintiff had belatedly identified as the authors of statements regarding his business. *Id.* at 446-47. The Maryland Court of Appeals reversed, holding that the trial court abused its discretion in refusing to quash the subpoena because the commenters were not defendants and the plaintiff had not amended his complaint to name them as defendants. *Id.* at 449.

Allowing Hadeed to proceed in this fashion would open the door to injustice. Plaintiffs could pierce the constitutionally protected anonymity rights of dozens, even hundreds, of anonymous online speakers simply by alleging that a sole Doe defendant was responsible for all of their statements. Armed with the identifying information, the plaintiff could pressure speakers for cash settlements before determining which of them would make the most vulnerable target – or have the deepest pockets – and only then amend the complaint to substitute a named individual. The solution to this problem is simple and would in no way erode a plaintiff's legitimate attempt to identify the author of tortious online speech: the

plaintiff must list each screen name as a separate Doe defendant. That has been the practice in many of the cases involving multiple alleged anonymous tortfeasors. *See, e.g.*, *Krinsky*, 72 Cal. Rptr. 3d at 235 (plaintiff in underlying case sued 10 Doe defendants and referred to them by their screen names); *Dendrite*, 775 A.2d at 763-64 (plaintiff sought to identify John Does 1 through 4, representing separate commenters on Yahoo bulletin board). Hadeed failed to do that here.

3. Hadeed's Complaint Fails on Statute of Limitations Grounds

In any event, Hadeed is now barred from proceeding against any of the individuals responsible for the allegedly defamatory Yelp reviews. There is no statutory basis for tolling the statute of limitations in actions against "John Doe" defendants in Virginia other than the uninsured motorist statute, Va. Code § 38.2-2206, which plainly has no application here. *See Williams v. Doe*, 48 Va. Cir. 52 (1999). The relevant statute contains a mechanism for identifying Doe defendants, but is silent regarding the statute of limitations. Va. Code § 8.01-407.1.

Although this Court has not directly addressed the issue, Circuit Courts have regularly held that substituting an actual person for a Doe defendant operates as the addition of a party, and therefore does not relate back to the filing of the complaint for statute of limitations purposes. *See,*

e.g., *Kovatch Mobile Equip. Corp. v. Frederick Cnty. Maint. Dep't*, 62 Va. Cir. 52 (2003) (sustaining demurrer regarding John Doe defendants); *Conley v. Bishop*, 32 Va. Cir. 236 (1993) (sustaining plea in bar on statute of limitations grounds by individual substituted for Doe defendant); *c.f. Hughes v. Doe*, 273 Va. 45, 47 (2007) (noting that Circuit Court had granted defendant's plea in bar and dismissed with prejudice individual substituted for Jane Doe defendant); *Rockwell v. Allman*, 211 Va. 560, 561 (1971) (statute allowing for amendment of pleading to correct misnomer of party applies only where "the right party [is] before the court although under a wrong name") (internal quotation marks omitted).

As several of these courts have observed, allowing the naming of a Doe defendant to automatically toll the statute of limitations would render those statutes meaningless because plaintiffs could evade the limitations bar simply by naming one or more Doe defendants to be identified later. *E.g.*, *Conley*, 32 Va. Cir. at 237 (citing *Bruce v. Smith,* 581 F.Supp. 902, 908 (W.D.Va.1984)). Because the allegedly defamatory Yelp reviews were posted between December 2011 and April 2012, Compl. ¶ 11, Hadeed's claims are well beyond Virginia's one-year statute of limitations for defamation actions. Va. Code § 8.01-247.1.

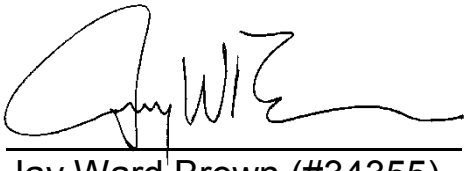
Interpreting Section 8.01-407.1 as tolling the statute of limitations—which is not warranted given the plain language of the statute—or holding that the limitations period is equitably tolled in this circumstance would not aid Hadeed in any event. Because the Complaint does not identify which Doe defendant is purportedly responsible for which allegedly defamatory review, as discussed *supra*, it cannot be said that any of the seven Yelp reviewers is John Doe #1 or John Doe #2. In other words, because Virginia does not allow suits against Doe defendants and because Hadeed failed to properly identify the Yelp reviewers as defendants in any event, Hadeed would have to institute another action to make a defamation claim, and such an action would be barred by the statute of limitations. The subpoena should be quashed for this additional reason – that unmasking the reviewers at this late date could serve no genuine judicial purpose.

CONCLUSION

The statutory framework of Virginia Code § 8.01-407.1 incorporates the requirements of the First Amendment to maintain a shield against the retaliation that motivates speakers such as the Yelp Reviewers to conceal their identities, thereby encouraging their engagement in matters of concern to the public. This is what the Virginia legislature intended. Accordingly, for the foregoing reasons, *amici* respectfully request that the decision by the Court of Appeals below be reversed, and the subpoena *duces tecum* quashed.

Dated: July 30, 2014

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the brief is in compliance with the type-volume limitations set forth in Virginia Supreme Court Rule 5:26, as the foregoing brief is in 14-point Arial proportional font and is 37 pages in length, not including the cover page, table of contents, table of authorities, and certificates.

Dated: July 30, 2014 By: Shaina J. Ward

Shaina Jones Ward

CERTIFICATE OF FILING

The undersigned certifies that **FIFTEEN** copies of the foregoing **BRIEF OF *AMICUS CURIAE*** were mailed for filing with this Court via FEDERAL EXPRESS, this 30th day of July, 2014. The undersigned further certifies that an electronic copy of this brief has been emailed to: scvbriefs@courts.state.va.us.

Dated: July 30, 2014 By: 

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she caused **THREE** copies of the foregoing **BRIEF *AMICUS CURIAE*** to be served via FEDERAL EXPRESS, this 30th day of July, 2014 upon:

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