IN THE SUPREME COURT OF VIRGINIA

RECORD NO. 140242

YELP, INC.,

Non-Party Respondent-Appellant,

v.

HADEED CARPET CLEANING,

Plaintiff-Appellee.

BRIEF OF *AMICUS CURIAE* ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF RESPONDENT-APPELLANT YELP, INC.

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July 30, 2014

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Electronic Frontier Foundation ("EFF") is a member-supported civil liberties organization working to protect free speech and privacy rights in the online world. The ability of pseudonymous and anonymous online speakers to keep their identities hidden from civil litigants, a privacy right recognized by the First Amendment, has been a frequently litigated issue in courts across the country, and EFF has been an active participant in these cases, including serving as counsel in the seminal case of *Doe v. 2TheMart.com, Inc.,* 140 F. Supp. 2d 1088 (W.D. Wash. 2001). *See also, e.g., Doe v. SEC,* Nos.11-17827, 11-17830, 11-17834 (9th Cir. Mar. 21, 2012) (amicus); *USA Technologies, Inc. v. Doe*, 713 F. Supp. 2d 901, 906 (N.D. Cal. 2010) (counsel). EFF's members, recognizing the importance of the right at issue, continue to take a strong interest in protecting online anonymity. With more than 28,000 dues-paying members nationwide, including 713 active donors in Virginia, EFF represents the interests of technology users in both court cases and in broader policy debates surrounding the application of law—including the First Amendment—in the digital age.

STATEMENT OF THE CASE

Amicus concurs with the Statement of the Case set forth in Appellant Yelp's opening brief.

STATEMENT OF FACTS

Amicus concurs with the Statement of Facts set forth in the Appellant Yelp's opening brief.

STANDARD OF REVIEW

Amicus concurs with the Statement of Facts set forth in the Appellant Yelp's opening brief.

ASSIGNMENTS OF ERROR

Amicus concurs with the Assignments of Error set forth in the Appellant Yelp's opening brief.

ARGUMENT

Under the broad protections of the First Amendment, speakers have not only a right to speak but also the right to do so anonymously. Particularly in the online context, anonymity is often at the core of the decision to participate in the marketplace of ideas. Online platforms facilitate a vast amount of speech, which serves the democratic ends of the First Amendment. Even where specific speech is allegedly defamatory or otherwise unprotected, courts avoid adopting rules that would burden the

free flow of information. Accordingly, the First Amendment requires that those who seek to unmask anonymous speakers—online or otherwise—demonstrate a *compelling need* for such identity-related information.

Here, Hadeed seeks to discover the identity of the authors of seven negative reviews of its carpet cleaning business based on the bare assertion that they were not actually Hadeed customers and that the reviews are therefore defamatory.

Courts around the country have agreed that, at a minimum, plaintiffs must make an evidentiary showing demonstrating a compelling need for the information in order to unmask an anonymous speaker. However, the Court of Appeals did not require Hadeed to demonstrate *with sufficient evidence* that it can meet that standard here in order to discover the identities of the authors of the Yelp reviews Hadeed alleges are defamatory. This ruling places the court out of step with the vast weight of authority. Whether this Court chooses to interpret Virginia Code § 8.01-407.1 to require a sufficient evidentiary showing or to adopt the test formulated by another court, it must comport with the minimum standards of the First Amendment.

Furthermore, absent any basis on which the Court can evaluate the appropriateness of Hadeed's exercise of its subpoena power, Hadeed's

attempt to compel the production of First Amendment protected material must fail, and the ruling of the Court of Appeals must be reversed. Finally, the Court of Appeals' ruling that it had subpoena jurisdiction over Yelp to compel the production of documents held in California risks upending the balance of limits on state sovereignty and disregards Yelp's choice to locate its records in California. This holding should also be reversed.

I. ANONYMOUS ONLINE SPEAKERS ARE REGULARLY SUBJECTED TO HARASSING TACTICS INTENDED TO CHILL THEIR SPEECH.

The right to speak anonymously is deeply embedded in the political and expressive history of this country. Allowing individuals to express their opinions unmoored from the context of identity encourages participation in the public sphere by those who might otherwise be discouraged from doing so. As the Supreme Court held in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995), "The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible."

Anonymity is often a "shield from the tyranny of the majority." *Id.* at 357. For that reason, courts have widely recognized that allowing anonymous online speakers to be stripped of their anonymity has the

potential to expose them to bullying tactics of litigants who do not like the content of their speech. *Doe v. Cahill*, 884 A.2d 451, 459 (Del. 2005); *Dendrite Int'l v. Doe No. 3*, 775 A.2d 756, 767 (N.J. App. Div. 2001).

Amicus EFF has witnessed these tactics at work firsthand. By bringing an ultimately frivolous lawsuit, litigants often seek to unmask anonymous speakers in order to humiliate them or discourage their speech. Thankfully, most courts have been aware of the harm that would flow from allowing such baseless subpoenas to issue without first considering the justification for unmasking these individuals.

In one recent case, USA Technologies, Inc. targeted an anonymous Yahoo! message board user, "Stokklerk," who had characterized the company's high executive compensation rates as "legalized highway robbery" and "a soft Ponzi." Even though USA Technologies could not prove that these posts were anything but constitutionally protected opinion, it issued a subpoena to Yahoo! to uncover Stokklerk's identity. *Amicus*, counsel for the Doe, brought a motion to quash, and the court agreed, recognizing "the Constitutional protection afforded pseudonymous speech over the internet, and the chilling effect that subpoenas would have on lawful commentary and protest." *USA Technologies, Inc. v. Doe*, 713 F. Supp. 2d 901, 907 (N.D. Cal. 2010) (applying modified *Dendrite* test for

compelling identity of anonymous speakers adopted in *Highfields Capital Mgmt. v. Doe,* 385 F. Supp. 2d 969, 974-76 (N.D. Cal. 2005)).

In another, Jerry Burd, the superintendent of the Sperry, Oklahoma school district, sued anonymous speakers who criticized him on an online message board. Burd filed a subpoena seeking to identify and humiliate the site's creator and everyone who had posted or even registered on the site. When *amicus* intervened on behalf of the site operator and a registered user, Burd immediately dropped the subpoena. *See Anonymity Preserved for Critics of Oklahoma School Official,* EFF (July 18, 2006).[1]

The use of harassing subpoenas is also a favorite tactic in online copyright infringement litigation. In a typical case, the owners of adult movies file mass lawsuits based on single counts of copyright infringement stemming from the downloading of a pornographic film, and improperly lump hundreds of defendants together regardless of where their Internet Protocol addresses indicate they live. The motivation behind these cases appears to be to leverage the risk of embarrassment associated with pornography, as well as the accompanying costs of litigation, to wield as a sword to coerce settlement payments of several thousand dollars from each of these individuals, despite serious problems with the underlying

[1] *Available at* https://www.eff.org/press/archives/2006/07/18.

claims. Courts across the country, including the DC Circuit, have recognized the illegitimacy of these tactics. *See, e.g., AF Holdings, LLC v. Does 1-1058*, 752 F.3d 990, 992 (D.C. Cir. 2014) (describing "porno-trolling" tactics targeting anonymous downloaders en masse) (quotations omitted). Equally important, these cases have also established that plaintiffs who sue for copyright infringement similarly cannot ignore First Amendment values protecting anonymity. *See Arista Records, LLC v. Doe 3,* 604 F.3d 110, 119 (2d Cir. 2010) (weighing qualified First Amendment privilege in copyright infringement case).

These scenarios demonstrate that the Supreme Court's concern for protecting a speaker's decision in favor of anonymity is far from theoretical. In light of the significant potential for the abuse of subpoena power to unmask anonymous speakers, *Amicus* urges the Court to give full consideration to the First Amendment issues at stake in this case.

II. ONLINE ANONYMOUS SPEECH, INCLUDING REVIEWS AND CRITICISM OF BUSINESSES, IS ENTITLED TO FULL FIRST AMENDMENT PROTECTION.

A. Anonymous Online Speech Is Protected by the First Amendment.

The United States Supreme Court has consistently defended the right to anonymous speech in a variety of contexts. In particular, "an author's decision to remain anonymous, like other decisions concerning omissions

or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." *McIntyre*, 514 U.S. at 342; *see also Talley v. California*, 362 U.S. 60, 64 (1960) (finding a municipal ordinance requiring identification on hand-bills unconstitutional, noting that "[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind."); *Buckley v. Am. Constitutional Law Found., Inc*., 525 U.S. 182, 199 (1999) (finding that state law that required circulators of ballot petitions wear badges with their full names was even more severe than *McIntyre*); *Jaynes v. Com.*, 666 S.E.2d 303 (Va. 2008).

Anonymity receives the same constitutional protection whether the means of communication is a political petition or an Internet message board. *See Reno v. ACLU*, 521 U.S. 844, 870 (1997) (there is "no basis for qualifying the level of First Amendment protection that should be applied to the Internet"). Due to both its technological properties and its popularity, the Internet enables an unprecedented amount of speech, including anonymous speech. In this way, the Internet furthers the core purposes of the First Amendment. As the Supreme Court has recognized, the Internet is a democratizing medium that dramatically enlarges the number of speakers and thus furthers a robust marketplace of ideas. *Id.* at 885. The range of

speech on the Internet is as diverse as the millions of online platforms, from microblogging and social media to consumer reviews to longform news and political activism. On many of these platforms, the choice to remain anonymous or pseudonymous is not only permitted, it is well within the norm.[2]

Moreover, courts and commentators have argued that the ease of speaking anonymously online is at the core of the Internet's democratizing tendency. "'This unique feature of [the internet] promises to make public debate in cyberspace less hierarchical and discriminatory' than in the real world because it disguises status indicators such as race, class, and age." *Cahill*, 884 A.2d at 456 (quoting Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace,* 49 Duke L.J. 855, 896 (2000)). *See also Doe v. 2theMart.com, Inc.*, 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001) ("The right to speak anonymously extends to speech via the Internet. Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas."). As discussed above, anonymity also

[2] In a recent Pew Research study, approximately a quarter of U.S. Internet users reported that they posted comments online without revealing their real name, while a similar number reported using a temporary username or email address. Relatedly, 36% of respondents decided not to use a website that required use of their real name. *See* Lee Rainie, *et al., Anonymity, Privacy, and Security Online*, PewResearch Internet Project (Sep. 5, 2013), http://www.pewinternet.org/2013/09/05/anonymity-privacy-and-security-online.

encourages increased participation by removing the legitimate fear of wrongful retaliation. *See also* Lyrissa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 Notre Dame L. Rev. 1537, 1570-71 (2007).

As with all speech, anonymous speech can be defamatory, but such misuse can only be punished in full accordance with First Amendment principles. "Political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse." *McIntyre*, 514 U.S. at 357 (citing *Abrams v. United States,* 250 U.S. 616, 630–631 (1919) (Holmes, J., dissenting)). As the Court of Appeals succinctly put it in this case, "[a]n Internet user does not shed his free speech rights at the log-in screen." *Yelp v. Hadeed Carpet Cleaning*, 752 S.E.2d 554, 560 (Va. App. 2014).

B. Reviews and Criticism of Businesses Are a Highly Valuable Component of Online Discourse and Are Not Commercial Speech.

Nevertheless, the Court of Appeals erroneously concluded that the Yelp user reviews at issue here were entitled to less than full First Amendment protection because they constituted commercial speech. *Id.* at 560-61.

This is a dangerous conclusion in light of the popularity of Internet reviews and the value they provide to consumers. Millions of users routinely rely on reviews they find online to make decisions about what products to buy and services to use, where to travel, and hundreds of other decisions.[3] Just as with other kinds of speech, the proliferation of these reviews promotes a robust marketplace of ideas and allows readers to make enlightened choices.

The informational value of these reviews goes beyond providing full information to other consumers, however. Reviews by ordinary users can reveal problems with products and warn of dangerous uses. In addition, manufacturers may be encouraged to improve or withdraw defective products. In one well-known example, an anonymous user on a forum for bicyclists posted a description of a serious flaw in a Kryptonite bike lock. Within two weeks, the post had been widely reported on, and the company announced it would replace nearly 100,000 flawed locks for free.[4]

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[3] A Pew Research study reported that 80% of Internet users consult online reviews, while more than 30% have written their own. *See* Susannah Fox & Maeve Duggan, *Peer-to-Peer Health Care*, PewResearch Internet Project (Jan. 15, 2013), *http://www.pewinternet.org/2013/01/15/peer-to-peer-health-care*.

[4] David Kirkpatrick, *Why There's No Escaping the Blog*, Fortune (Jan. 10, 2005), http://archive.fortune.com/magazines/fortune/fortune_archive/2005/01/10/8230982/index.htm.

The Court of Appeals misapplied the commercial speech doctrine in reaching its conclusion. The Supreme Court has held that "expression related solely to the economic interests of the speaker and its audience" is accorded "lesser protection" by the First Amendment. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 561, 563 (1980). But as the Court's cases make clear, this "commercial speech" is an extremely narrow category, limited to advertising that does no more than "propose a commercial transaction." *Id.* at 562. The Fourth Circuit has listed other factors that affect whether speech is commercial, including (1) whether it is an advertisement; (2) whether it refers to a specific product or service; and (3) whether the speaker has an economic motivation. *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 721 F.3d 264, 285 (4th Cir. 2013) (citing *Bolger v. Youngs Drug Prods. Corp.,* 463 U.S. 60, 66 (1983)).

By these standards, the reviews at issue here are not commercial speech. Most important, the reviews propose no commercial transaction at all; indeed they advise against entering into a transaction with Hadeed. Nor are they "advertisements" by any stretch of the word. Furthermore, Yelp users, like the majority of people who write online reviews of products and

services, derive no direct economic benefit from their reviews.[5] Indeed, their motivations to post reviews on Yelp are likely as varied that of any speaker.[6] As the reviews in this case demonstrate, reviewers often seek to warn others of poor service, recommend merchants whom they trust, create goodwill for these merchants, and often, to establish themselves as reliable resources for others.[7]

Finally, while the reviews do refer to a specific service—Hadeed Carpet Cleaning—this fact alone cannot suffice to render them commercial speech subject to diminished First Amendment protection. Were this the case, the category of commercial speech would, for instance, entirely subsume arts criticism as a genre. In fact, sharp-edged criticism is a time-

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[5] Yelp's Terms of Service section 6(A)(i) bars "compensating someone or being compensated to write or remove a review." JA 123.

[6] Therefore, the Court of Appeals' reliance on *Lefkoe v. Jos. A. Bank Clothiers, Inc.,* 577 F.3d 240, 248-49 (4th Cir. 2009) was misplaced. In *Lefkoe*, the Fourth Circuit held that an anonymous stockholder's letter to a company Audit Committee was commercial speech because it did no more than request that the Committee share the contents of the letter with the company's auditors. *Id.* The court held that this was "solely related to the economic interests of the speaker and its audience." *Id*. at 248 (quotations omitted).

[7] Yelp has a number of mechanisms to aid users of its site in finding trustworthy reviews. *See* Yelp's Pet. for Appeal at 8 (describing Yelp's proprietary algorithm for screening potentially less reliable reviews). In addition, when merchants disagree with reviews of their business, they can respond directly to these reviews, such that Yelp users see both the original review and the response, and can judge for themselves which to give more weight. *Id.* at 10-11.

honored form of literary expression, entitled to full First Amendment protection. *See Bose Corp. v. Consumers Union*, 466 U.S. 485, 487, 513 (1984) (discussing strong First Amendment interests in a consumer review not treated as commercial speech). If a Yelp review—even a strongly negative one like "Hadeed shrunk my carpet"—is solely economic in nature because it refers to a business transaction, so too is a respected film critic's "thumbs down" verdict because it has the potential to diminish the movie's box office.

III. IN ORDER TO SATISFY THE FIRST AMENDMENT, THE COURT MUST REQUIRE HADEED TO MAKE A SUFFICIENT EVIDENTIARY SHOWING DEMONSTRATING A COMPELLING NEED BEFORE ALLOWING UNMASKING OF ANONYMOUS SPEAKERS.

A. Anonymous Speakers Enjoy a Qualified Privilege under the First Amendment.

Because the First Amendment fully protects anonymous speech, efforts to use the power of the courts to pierce anonymity[8] are subject to a qualified privilege. Courts must "be vigilant . . . [and] guard against undue hindrances to . . . the exchange of ideas." *Buckley*, 525 U.S. at 192. This vigilant review "must be undertaken and analyzed on a case-by-case basis," where the court's "guiding principle is a result based on a

[8] Of course, a court order, even if granted to a private party, is state action and therefore subject to constitutional limitations. *See, e.g., New York Times v. Sullivan*, 376 U.S. 254, 265 (1964).

meaningful analysis and a proper balancing of the equities and rights at issue." *Dendrite,* 775 A.2d at 761. Just as in other cases in which litigants seek information that may be privileged, courts must consider the privilege before permitting discovery of a defendant's identity. *See, e.g., Grandbouche v. Clancy,* 825 F.2d 1463, 1466 (10th Cir. 1987) ("[W]hen the subject of a discovery order claims a First Amendment privilege not to disclose certain information, the trial court must conduct a balancing test before ordering disclosure.").

All parties to this dispute agree that the constitutional privilege to remain anonymous is not absolute. Plaintiffs may properly seek information necessary to pursue reasonable and meritorious litigation. As the Court of Appeals put it, "if the reviews are unlawful in that they are defamatory, then the John Does' veil of anonymity may be pierced, provided certain procedural safeguards are met." *Yelp v. Hadeed Carpet Cleaning*, 752 S.E.2d at 560; *see also Cahill*, 884 A.2d at 456 ("Certain classes of speech, including defamatory and libelous speech, are entitled to no constitutional protection.").

Rather, the dispute is as to the proper standard to apply in deciding whether to uphold the reviewers' anonymity. The Court of Appeals rejected the guidance of numerous other state courts, including the leading case of

Dendrite, and instead held that Virginia Code § 8.01-407.1 provides the sole standard for Virginia courts faced with unmasking anonymous speakers. 752 S.E.2d at 565. This conclusion should be reversed because this interpretation of § 8.01-407.1 fails to meet the minimum standards of the First Amendment.

B. The First Amendment Requires That a Defamation Plaintiff Must Make a Prima Facie Showing with Specific Evidence Supporting Its Claim.

Although the Supreme Court has yet to announce a canonical First Amendment standard for piercing anonymity in defamation actions, its decisions in *McIntyre* and *Talley* provide guidance. In particular, the Court has made clear that unmasking must serve a compelling need and it has applied strict scrutiny where political speech is burdened. *McIntyre*, 514 U.S. at 348.

In the context of defamation actions brought against anonymous online speakers, numerous state and federal courts have considered how to apply this compelling need requirement and have overwhelmingly endorsed tests demanding the production of a sufficient evidentiary basis to support the underlying legal theories prior to the piercing of anonymity.[9]

[9] Last month, the Kentucky Court of Appeals became the latest jurisdiction to require that a plaintiff make a prima facie showing sufficient to meet a summary judgment standard in order to unmask an anonymous speaker.

Critically, according to the vast weight of authority, merely articulating the *plausible* existence of a valid claim is insufficient to support compelled disclosure. *See* Lyrissa Barnett Lidsky, *Anonymity in Cyberspace: What Can We Learn from John Doe?* 50 B.C.L. Rev. 1373, 1377-78 (2009).

The opinion in *Dendrite Int'l v. Doe No. 3*, 775 A.2d 756 (N.J. App. Div. 2001), remains the leading precedent regarding "the appropriate procedures to be followed and the standards to be applied by courts in evaluating applications for discovery of the identity."[10] *Id.* at 758. *See also*

Doe v. Coleman, 2014-CA-000293-OA, 2014 WL 2785840, at *3 (Ky. Ct. App. June 20, 2014). For other examples of opinions in which courts have required an evidentiary showing prior to the compelled disclosure of online identity information, *see*, *e.g.*, *In re Indiana Newspapers*, 963 N.E.2d 534 (Ind. App. 2012); *Pilchesky v. Gatelli*, 12 A.3d 430 (Pa. Super. 2011); *Mortgage Specialists v. Implode-Explode Heavy Indust.*, 999 A.2d 184 (N.H. 2010); *Salehoo Grp., Ltd. v. ABC Co.*, 722 F. Supp. 2d 1210 (W.D. Wash. 2010); *Indep. Newspapers v. Brodie*, 966 A.2d 432 (Md. 2009); *Solers, Inc. v. Doe*, 977 A.2d 941 (D.C. 2009); *Sinclair v. TubeSockTedD*, 596 F. Supp. 2d 128 (D.D.C. 2009); *Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231 (Cal. Ct. App. 2008); *Doe I and Doe II v. Individuals*, 561 F. Supp. 2d 249 (D. Conn. 2008); *Mobilisa, Inc. v. Doe*, 170 P.3d 712 (Ariz. Ct. App. 2007); *Doe v. Cahill*, 884 A.2d 451 (Del. 2005); *Highfields Capital Mgmt., L.P. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2005); *Best Western Int'l v Doe*, No. CV-06-1537-PHX-DGC, 2006 WL 2091695 (D. Ariz. Jul. 25, 2006).

[10] As Professor Lidsky has cataloged, some courts have instead followed the later guidance from *Cahill*, requiring "a showing of evidence sufficient to avoid summary judgment, without the additional balancing test." Lidsky, *Anonymity in Cybersapce*, at 1378. Despite the differences in wording, courts applying these standards will often reach the same result. In formulating its own standard rather than adopting *Dendrite* wholesale, the *Cahill* court noted that the summary judgment standard inherently

SaleHoo Group, Ltd. v. ABC CO., 722 F. Supp. 2d 1210, 1214 (W.D. Wash. 2010) (noting that case law "has begun to coalesce around the basic framework of the test articulated in *Dendrite*). The court in *Dendrite* described those procedures as follows:

> 1. make reasonable efforts to notify the accused Internet user of the pendency of the identification proceeding and explain how to present a defense;
>
> 2. quote verbatim the allegedly actionable online speech [if the underlying claim is defamation];
>
> 3. allege all elements of the cause of action;
>
> 4. present evidence supporting the claim of violation; and,
>
> 5. "[f]inally, assuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed."

775 A.2d at 760-61. The strengths of the *Dendrite* standard are that it can be flexibly applied on a case-by-case basis while still allowing a court to dispose of frivolous or abusive subpoenas at an early stage. *Id.* at 761.

But regardless of whether the Court adopts the *Dendrite* standard, formulates its own, or construes § 8.01-407.1 accordingly, it must give practical effect to First Amendment interests in anonymity and guard

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contained the *Dendrite* elements it omitted as unnecessary. *Cahill*, 884 A.2d at 461.

against abuse by holding that the First Amendment requires sufficient evidence rather than conjecture in order to unmask. Lower standards—such as a "good faith basis" for the plaintiff's claim—that fail to require such evidence impermissibly risk chilling speech and open the door to the kind of harassment of anonymous speech that the Supreme Court feared in *McIntyre* and which *amicus* described above.

> "Plaintiffs can often initially plead sufficient facts to meet the good faith test . . . even if the defamation claim is not very strong, or worse, if they do not intend to pursue the defamation action to a final decision. 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."

Cahill, 884 A. 2d at 457; *see also Brodie*, 966 A.2d at 456 (*"*The lower good faith basis or motion to dismiss thresholds. . . would inhibit the use of the Internet as a marketplace of ideas, where boundaries for participation in public discourse melt away, and anyone with access to a computer can speak to an audience larger and more diverse than any [of] the Framers could have imagined.") (quotations and footnotes omitted).

C. Because Virginia Code § 8.01-407.1 As Construed by the Court of Appeals Fails to Require a Prima Facie Showing with Specific Evidence Supporting the Plaintiff's Claim, It Does Not Satisfy the First Amendment.

The Court of Appeals held that the relevant component of Virginia's statutory unmasking standard, Virginia Code § 8.01-407.1)(A)(1)(a), "has two, distinct subparts. Under the first subpart, the plaintiff must show that the communications are or may be tortious. If there is direct evidence demonstrating that the communications are tortious, and the plaintiff provides that evidence to the circuit court, then there is no need to analyze the second subpart of this prong." 752 S.E.2d at 564. However, the Court of Appeals also held that a plaintiff could independently satisfy the statute by "show[ing] that he has a 'legitimate, good faith basis' for his belief that the communications are or may be tortious." *Id*. at 565.

Moreover, it is undisputed that the Court of Appeals did not require Hadeed to provide a sufficient evidentiary basis for its defamation claim here. Instead, the court found that Hadeed met the "good faith basis" subpart to believe that the reviewers were not customers based on its efforts to match the reviews with its customer database. 752 S.E.2d at 567. As a result it also held that Hadeed had produced sufficient evidence to show that "the reviews are or *may be* defamatory, if not written by actual customers." *Id.* at 567 (emphasis added). However, as Judge Haley

explained in dissent, this "evidence" is ultimately circular, since it depends entirely on the unsupported assertion that the database search is sufficient to show the reviewers are not customers. *Id*. at 570 (Haley, S.J., dissenting); *See also* Yelp Pet. for Appeal at 9-10, 23. Moreover, Hadeed did not deny the content of the reviews, let alone present sufficient evidence that they were defamatory in addition to being false.

Yelp urges this Court to construe both subparts of § 8.01-407.1(A) to comport with the evidentiary requirements of *Dendrite* and its progeny, an argument that *amicus* supports. However, the Court of Appeals rejected this statutory construction. 752 S.E.2d at 565-66. Moreover, the clear language of the statute allows a litigant to unmask an anonymous speaker based only on a "legitimate good faith basis."

Thus, to the extent that the Court reads this language to allow proceeding without direct evidence of a prima facie case as required by *Dendrite* and its progeny—or an equivalent evidentiary standard—such a statutory construction is unconstitutional because it fails to provide sufficient protections for anonymous speech. As discussed above, a good faith basis is not a compelling need for the purposes of the First Amendment.

IV. SUBPOENA JURISDICTION OVER YELP IN VIRGINIA WAS NOT PROPER.

Independently, the subpoena must be quashed because it seeks records from a non-party that are held out of state. Traditionally, the limits of state sovereignty have prevented courts from requiring production of documents held outside the jurisdiction, even when a subpoena recipient is subject to personal jurisdiction. Procedural limits on subpoena power both protect non-party intermediaries from courts' duplicative or conflicting demands and give substance to intermediaries' choice of where to locate documents and their corresponding choices about protection of user data.

A. Historically, State Sovereignty Has Limited Subpoena Power over Foreign Non-parties, Even When a Court May Have Personal Jurisdiction and the Non-party Has Been Correctly Served.

Contrary to the circuit court's finding, subpoena power does not reach as far as personal jurisdiction. Unlike personal jurisdiction, which has expanded beyond traditional limits in the modern era, subpoena powers remained bound by historical limits on state sovereignty, in addition to due process. *See Pennoyer v. Neff*, 95 U.S. 714, 720 (1877) ("The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established."). As the Mississippi Supreme Court stated in *Syngenta Crop Protection, Inc. v. Monsanto Co.,* "the basic concepts of

personal jurisdiction and subpoena power are vastly different." 908 So.2d 121, 127 (Miss. 2005). Hence, minimum contacts analysis or the standard set forth in *Zippo Manufacturing Co. v. Zippo Dot Com*, 952 F. Supp. 1119 (W.D. Pa. 1997), do not control whether a state has the power to subpoena documents. Although Yelp might fall under the jurisdiction of the local courts in many parts of the United States, subpoena power for records present in San Francisco belongs with the court of the district where the records are kept. *See In re Nat'l Contract Poultry Growers' Ass'n*, 771 So.2d 466, 469 (Ala. 2000) (stating that a subpoena for documents located in Louisiana must be issued by a Louisiana court). "A [state] court cannot order a nonresident nonparty witness to appear and/or produce documents at a deposition in [the state], even if that nonresident nonparty is subject in another context to the personal jurisdiction of the court." *Phillips Petroleum Co. v. OKC Ltd. Partnership*, 634 So.2d 1186, 1189 (La. 1994).

Thus state courts have declined to attempt to extend their subpoena powers outside of their borders, especially in the absence of express statutory authorization. *See Colorado Mills, LLC v. SunOpta Grains and Foods Inc.,* 269 P.3d. 731, 734 n.4 (Colo. 2012) (collecting cases); *see also In re Special Investigation No. 219,* 445 A.2d 1081, 1085 (Ct. Special App. Md. 1982) (absent a statute state cannot "compel a non-resident witness to

produce records in the State."); *Craft v. Chopra*, 907 P.2d 1109, 1111 (Okla. 1995) (finding that the Oklahoma statute did not extend the discovery process outside the state).

Unlike some other states, no Virginia statute authorizes the issuance of Virginia subpoenas for non-resident non-parties. Rule 4:9(A) and Va. Code § 8.01-301, relied on by the courts below, *see* 752 S.E.2d at 569, do not contain a clear statement authorizing out-of-state subpoenas. And without such a clear statement, the "axiom[]" that "the subpoena powers of the State . . . stop at the state line" must prevail. *In re Special Investigation No. 219,* 445 A.2d at 1085.

Nor does correct service of process on a corporation entitle a party to subpoena out-of-state documents. The Court of Appeals noted that a subpoena is process, and like other forms of process, it can be served upon a registered agent of a foreign corporation. 752 S.E. 2d. at 569 (citing *Bellis v. Commonwealth,* 402 S.E.2d 211, 214 (1991)). But correct service of process does not permit states to reach outside their borders by conferring subpoena power over documents held elsewhere by a non-party, non-resident corporation. *See Syngenta*, 908 So.2d at 123, 127 (despite the fact that corporation was correctly served via registered agent,

the court lacked subpoena power to gain access to documents located out of state).

B. The Appropriate Means to Resolve Subpoena Power Over Yelp Is To Go Through the California Courts.

As noted by the circuit court, there is a path for Hadeed to request information from Yelp without exceeding the limits of the Virginia court's subpoena power. Namely, it can comply with the Virginia statute codifying the Uniform Interstate Depositions and Discovery Act ("UIDDA"). *See id.* (citing Va. Code §§ 8.01– 412.8, *et seq*). The documents requested by Hadeed are "stored in Yelp's administrative database" which is accessed in San Francisco. *Yelp v. Hadeed*, 752 S.E. 2d. at 557. Hadeed can, and should, file a request with the court where the documents are sought, compliant with California Code of Civil Procedure §§ 2029.100, *et seq*. Filing for a subpoena through the California courts does not even require making an appearance in California. Cal. Civ. Proc. Code § 2029.300. In so doing, the procedures set forth in Virginia's and California's versions of the UIDDA must be followed. *See* Va. Code. Ann. § 8.01-412.8 to -412.14 (2009); Cal. Civ. Proc. Code § 2029.100-2029.900.

There are also a number of strong policy reasons to require that all litigants follow the same uniform procedure for obtaining interstate document production. First, requiring a subpoena issued by a court in the

jurisdiction where the documents are held limits forum-shopping opportunities for plaintiffs. If an intermediary wishes to fight a subpoena, its motion to quash is subject to the standard of the issuing court. If subpoenas are always issued by the discovery jurisdiction, all subpoenas aimed at obtaining a set of documents are held to that jurisdiction's standard.

Moreover, UIDDA procedure preserves comity between states and ensures that limits on sovereignty are maintained. The lower court's departure from standard practice means that Yelp is now subject to Virginia's subpoena standards, rather than California's. Under the rule that the lower court has adopted, Virginia's subpoena jurisprudence can apply across the country. An enterprising plaintiff could file subpoenas in Virginia, knowing that Virginia has adopted a more lenient standard than its fellow courts. Non-parties would have to fight their requests in Virginia courts rather than the courts where the documents were stored, at additional and considerable expense. This is particularly problematic where, as here, the subpoena requests implicate First Amendment interests, which states are obligated to uphold on behalf of their citizens. For this reason, an intermediary's choice to store its documents in a jurisdiction with more

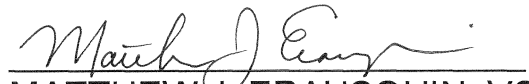
stringent subpoena requirements in order to protect its users should be entitled to significant weight.

Finally, a decision by this Court not to follow UIDDA procedures may result in associated consequences for Virginia residents. Some states (like Virginia) view the privileges of the UIDDA as reciprocal, only granting them to states that have passed similar legislation. Va. Code. Ann. § 8.01-412.14. Virginia courts independently compelling a California company via service on a registered agent could result in Virginia's subpoena procedures no longer being respected. If other states follow Virginia's lead, Virginia corporations may end up being responsible for responding to discovery requests made by courts across the country. These considerations additionally counsel retention of the traditional rule limiting courts from compelling the production of documents from a non-resident non-party.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed and the subpoena to Yelp should be quashed.

Dated: July 30, 2014 Respectfully submitted,



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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that on July 30, 2014, three (3) printed copies and one electronic copy on CD-ROM of the foregoing were served by UPS delivery service, on:

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I further certify that I have caused to be filed 15 printed copies of the foregoing with the Clerk of this Court and I have filed an electronic version of the foregoing with the Clerk via CD-ROM. I further certify that the

foregoing does not exceed fifty (50) pages and that I have otherwise complied with Rules 5:26 and 5:30 of the Rules of the Supreme Court of Virginia.

Dated: July 30, 2014

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