STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
LAW COURT DOCKET NO. CUM-04-295

RONALD FITCH,

Plaintiff-Appellee,

v.

JOHN OR JANE DOE #1,

Appellant

On Appeal From an Order of the
Cumberland County Superior Court

BRIEF FOR PUBLIC CITIZEN, AMERICAN CIVIL LIBERTIES UNION, MAINE CIVIL LIBERTIES UNION, AND ELECTRONIC FRONTIER FOUNDATION AS AMICI CURIAE

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INTEREST OF AMICI CURIAE

Public Citizen is a public interest organization based in Washington, D.C., which has more than 150,000 members, more than 1300 of them in Maine. Since its founding by Ralph Nader in 1971, Public Citizen has urged citizens to speak out against abuses by a variety of large institutions, including corporations, government agencies, and unions, and it has advocated a variety of protections for the rights of consumers, citizens and employees to encourage them to do so. Along with its efforts to encourage public participation, Public Citizen has brought and defended numerous cases involving the First Amendment rights of citizens who participate in public debates.

In recent years, Public Citizen has watched with dismay as an increasing number of companies have used litigation to prevent ordinary citizens from using the Internet to express their views about the manner in which companies have conducted their affairs. In recent years, Public Citizen has represented consumers, *Bosley Medical Institute v. Kremer*, 2004 WL 964163 (S.D. Cal.), workers, *Northwest Airlines v. Teamsters Local 2000*, No. 00-08DWF/AJB (D. Minn.), investors, *Hollis-Eden Pharmaceutical Corp. v. Doe*, Case No. GIC 759462 (Cal. Super. San Diego Cy.); and other members of the public, *Taubman v. WebFeats,* 319 F.3d 770 (6th Cir. 2003), who have been sued for criticisms they voiced on the Internet. *See generally* http://www.citizen.org/litigation/briefs/internet.htm. In these and other cases, companies have brought suit without having a substantial legal basis, hoping to silence their critics through the threat of ruinous litigation, or by using litigation to obtain the names of critics with the objective of taking extra-judicial action against them (such as by firing employees found to have made critical comments). Public Citizen has represented Doe defendants or appeared as amicus curiae in several cases in which subpoenas have sought to identify anonymous posters on Internet bulletin boards or web sites. *Northwest Airlines v. Teamsters Local 2000*, No. 00-08DWF/AJB (D. Minn.); *Hollis-*

Eden Pharmaceutical Corp. v. Doe, Case No. GIC 759462 (Cal. Super. San Diego Cy.); *iXL Enterprises v. Doe, No.* 2000CV30567 (Ga. Super. Fulton Cy.); *Thomas & Betts v. John Does 1 to 50*, Case No. GIC 748128 (Cal. Super. San Diego Cy.); *Hritz v. Doe,* C-1-00-835 (S.D. Ohio); *WRNN TV Associates v. Doe*, CV-00-0181990S (Conn. Super. Stamford); *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (App. Div. 2001); *Donato v. Moldow*, No. BER-L-6214-01 (N.J. Super. Bergen Cy.).

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 400,000 members dedicated to the principles of liberty and equality embodied in the Bill of Rights. Since its founding in 1920, the ACLU has sought to protect the First Amendment. In that connection, the ACLU has participated as counsel or amicus in many of the major First Amendment cases in the United States Supreme Court and other courts, including those that address the right to anonymous speech. For example, the ACLU and its Pennsylvania affiliate represented the Doe in *Melvin*, a case discussed below. The Maine Civil Liberties Union is the statewide affiliate of the ACLU in Maine.

The Electronic Frontier Foundation ("EFF") is a non-profit, member-supported civil liberties organization working to protect rights in the digital world. EFF actively encourages and challenges industry, government and the courts to support free expression, privacy, and openness in the information society. Founded in 1990, EFF is based in San Francisco. EFF has about 7300 members all over the United States and maintains one of the most-linked-to Web sites (http://www.eff.org) in the world.

EFF believes that free speech is a fundamental human right and that free expression is vital to society. The vast web of electronic media that now connects us has heralded a new age of

communications, a new way to convey speech. New digital networks offer a tremendous potential to empower individuals in an ever over-powering world. While EFF is mindful of the serious issues that may arise when information, ideas and opinions flow free, EFF is dedicated to addressing such matters constructively while ensuring that fundamental rights are protected - including the right to communicate and read anonymously.

Thus, EFF's interest in this case. EFF has represented individuals involved in several "Doe" litigations and has advised many others, both in California state courts and in various state and federal courts nationwide. *E.g.*, *Doe v. 2TheMart.com*, 140 F. Supp.2d 1088 (W.D. Wash. 2001); *Kesler v. Doe*, App. No. G029100 (Cal. App. 4th Dist. 2001); *Medinex Systems v. AWE2BAD4MDNX*, CIV0-1-0106-N-EJL (PVT) (N.D. Cal.); *Rural/Metro Corp. v. John/Jane Doe 1 et al*, C 00-21283 (N.D.Cal.); *Pre-Paid Legal Services. of Florida v. Sturtz*, No. CV798295 (Cal. Super. Santa Clara Cty.); *Hritz v. Doe*, C-1-00-835 (S.D. Ohio).

QUESTIONS PRESENTED

1. May a plaintiff compel the identification of an anonymous Internet speaker simply by alleging that the speech is tortious, without any proof of wrongdoing?

2. Do the typical terms of service governing relationships between Internet Service Providers ("ISP") and their customers, whereby the ISP reserves the right to disclose information when required by valid legal process, constitute an agreement by the customer to identification that waives the First Amendment right to speak anonymously without any testing of the validity of the subpoena?

STATEMENT

The Internet is a democratic institution in the fullest sense. It serves as the modern equivalent of Speakers' Corner in England's Hyde Park, where ordinary people may voice their opinions, however silly, profane, or brilliant they may be, to all who choose to listen. As the Supreme Court explained in *Reno v. American Civil Liberties Union,* 521 U.S. 844, 853, 870 (1997), "From a publisher's standpoint, [the Internet] constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers and buyers. . . . Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of web pages, . . . the same individual can become a pamphleteer." The Internet is a traditional public forum, and full First Amendment protection applies to free speech on the Internet. *Id.*

This appeal arises from a suit filed by Ronald Fitch over am email that was sent anonymously by John Doe, allegedly a resident of Portland, Maine, to members of the Board of the Great Diamond Island, Diamond Cove Committee. The email was sent from an account in the name of "Ronald Fitch fitchisland@hotmail.com." The email read, in its entirety,

> One and all
>
> Thank you all for the continued good work.
>
> Ron

In addition to this text the email contained an apparently innocuous cartoon portraying a man, a woman, a dog, and a sign reading "Welcome To Paradise." Plaintiff alleged that he was not the author of the email, that the email was part of a pattern of harassing activity, and that the sending of the email constituted defamation as well as a tortious invasion of privacy, infliction of emotional distress, and fraud.

Without any effort to provide notice to Doe, Fitch filed a motion for leave to serve a subpoena on Time Warner, the Internet Service Provider ("ISP") for the person who sent the email in question. The motion made reference to "other emails which were sent under [the same] fictitious name, but which were not provided with the motion." App. 23. The memorandum in support of the motion claimed that there had been certain "longstanding disagreements" among the members of the Board of Directors of the Great Diamond Cove Association," that the cartoon is a caricature that "lampoons [Fitch's] wife and causes her to be seen in a disrespectful light," and that disclosure of Doe's identity was needed to pursue Fitch's tort claims. App. 25.

Time Warner apparently notified Doe that information was being sought to identify him, and Doe appeared by counsel to oppose the motion for disclosure. Doe argued that the subscriber notification provision of the Cable Act of 1984, 27 U.S.C. § 551, allows disclosure of identifying information concerning a cable subscriber only if there is clear and convincing evidence that a crime has been committed, and that not only was there no evidence of wrongdoing, but only unsworn allegations in a complaint and motion papers, but there was no allegation that Doe's conduct was criminal. In response, Fitch argued that regardless of other limitations in the Cable Act, disclosure was always allowed with subscriber consent. In that regard, Fitch presented the Court with a copy of the standard Privacy Policy published by Time Warner for it subscribers, and pointed to language in that agreement warning that subscriber information could be revealed when allowed by court order or "to comply with valid legal process such as a subpoena or court order, or as required by law." App. 41-43. Fitch inferred that, because the Privacy Policy referred to a "subscriber agreement," that agreement itself must have referred back to the Privacy Policy and Doe must have agreed to the terms of that agreement. Finally, Fitch cited several decisions from other states in

which courts had established requirements that a plaintiff must meet in order to obtain an order identifying defendants who had allegedly engaged in wrongdoing online. App.45.

The Superior Court ordered disclosure, relying primarily on its agreement with Fitch's contention that Doe had agreed to disclosure by accepting Time Warner's Privacy Policy. App. 5. The Court therefore found it unnecessary to decide whether disclosure was warranted under the provisions of the Cable Act that authorize disclosure pursuant to court order. App. 6.

> There us absolutely no indication that Congress was seeking to prevent disclosure of persons who are alleged to have committed a form of identity theft by sending emails under false names. . . . [I]t is difficult to understand why there should be any distinction in terms of discovery of subscriber identities between persons who use cable ISPs and persons who use dial up ISPs.
>
> *Id.*

SUMMARY OF ARGUMENT

The Supreme Court of the United States has held that the Internet has the potential to be an equalizing force within our democracy, giving ordinary citizens the opportunity to communicate, at minimal cost, their views on issues of public concern to all who will listen. Accordingly, the Court has held that full First Amendment protection applies to communications on the Internet. Longstanding Supreme Court precedent also recognizes that speakers have a First Amendment right to communicate anonymously, so long as they do not violate the law in doing so. Thus, when a complaint is brought against an anonymous speaker, alleging that the speech was in violation of the rights of another, the courts must balance the right to obtain redress from the perpetrators of civil wrongs, against the right of those who have done no wrong to remain anonymous. In cases such as this one, these rights come into conflict when a plaintiff seeks an order compelling disclosure of a defendant's identity, which, if successful, would irreparably destroy the defendant's First

Amendment right to remain anonymous.

Suits against anonymous speakers are unlike the normal tort case, in which the identification of an unknown defendant at the outset of the case is merely the first step toward establishing liability for damages. In a lawsuit filed over anonymous speech, the identification of the speaker provides an important measure of relief to the plaintiff because it enables the plaintiff to employ extra-judicial self-help measures to counteract both the speech and the speaker, and creates a substantial risk of harm to the speaker, who not only loses the right to anonymous speech but is exposed to the plaintiff's self-help efforts to restrain or oppose his speech. In our system of laws, we ordinarily do not give substantial relief of this sort, even on a preliminary basis, absent proof that the relief is justified because success is likely and the balance of hardships favors the relief.

Whatever the reason for speaking anonymously, a rule that makes it too easy to remove the cloak of anonymity will deprive the marketplace of ideas of valuable contributions. To be sure, some individuals may speak anonymously because they fear the entirely proper consequences of improper speech, such as the prospect of substantial damages liability if they tell lies about somebody they do not like for the purpose of damaging her reputation. The challenge for the courts is to develop a test for the identification of anonymous speakers which makes it neither too easy for vicious defamers to hide behind pseudonyms, **nor** too easy for a big company or a public official to unmask critics simply by filing a complaint that manages to state a claim for relief under some tort or contract theory.

Amici urge this Court to embrace the developing consensus among those courts that have considered this question, by borrowing a standard from the well-developed rules governing the disclosure of anonymous sources in libel cases. Specifically, when faced with a complaint against

an anonymous speaker and a demand for discovery to identify that speaker, a court should (1) provide notice to the potential defendant and an opportunity to defend his anonymity; (2) require the plaintiff to specify the statements that allegedly violate its rights; (3) review the complaint to ensure that it states a cause of action based on each statement and against each defendant; (4) require the plaintiff to produce evidence supporting each element of its claims, and (5) balance the equities, weighing the potential harm to the plaintiff from being unable to proceed, against the harm to the defendant from losing his right to remain anonymous, and in light of the strength of the plaintiff's evidence of wrongdoing. In this way, the Court ensures that the plaintiff does not obtain an important form of relief – identifying its anonymous critics – and that the defendant is not denied important First Amendment rights, unless the plaintiff has a realistic chance of success on the merits.

Meeting these criteria can require time and effort on the part of the plaintiff, and may delay its quest for redress against a defendant whose speech is alleged to have violated the plaintiff's rights. However, everything that the plaintiff must do to comply with this test, it must also do to prevail on the merits of the case. Therefore, so long as this standard does not demand more information than most plaintiffs will be reasonably able to provide shortly after they file the complaint, the standard does not unfairly prevent the plaintiff with a legitimate grievance from achieving redress against an anonymous speaker. Moreover, most cases of this kind will primarily involve demands for monetary relief, except in the rare case where the plaintiff has a sound argument for being granted a preliminary injunction, notwithstanding the strong rule against prior restraints of speech.

Accordingly, although applying this standard may delay service of the complaint or completion of the litigation, it will not, ordinarily, prejudice the plaintiff. On the other hand, the fact

that after the defendant is identified, his right to speak anonymously has been irretrievably lost, counsels in favor of caution, and hence in favor of allowing sufficient time for the defendant to respond and requiring a sufficient showing on the part of the plaintiff.

ARGUMENT

A. The First Amendment Protection Against the Compelled Identification of Anonymous Speakers.

It is well-established that the First Amendment protects the right to speak anonymously. *Watchtower Bible and Tract Soc. of New York v. Village of Stratton*, 536 U.S. 150, 166-167 (2002); *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 199-200 (1999); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960). These cases have celebrated the important role played by anonymous or pseudonymous writings over the course of history, from the literary efforts of Shakespeare and Mark Twain to the authors of the Federalist Papers. As the Supreme Court said in *McIntyre*,

> [A]n author is generally free to decide whether or not to disclose his or her true identity. 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. Whatever the motivation may be, . . . the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, 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.
>
> * * *
>
> Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.

McIntyre, 514 U.S. at 341-342, 356.

These rights are fully applicable to speech on the Internet. The Supreme Court has treated the Internet as a public forum of preeminent importance because it places in the hands of any

individual who wants to express his views the opportunity to reach other members of the public who are hundreds or even thousands of miles away, at virtually no cost. Accordingly, the Court has held that First Amendment rights are fully applicable to communications over the Internet. *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997). Several courts have specifically upheld the right to communicate anonymously over the Internet. *ACLU v. Johnson*, 4 F. Supp.2d 1029, 1033 (D.N.M. 1998); *ACLU v. Miller,* 977 F. Supp. 1228, 1230 (N.D. Ga. 1997); *see also ApolloMEDIA Corp. v. Reno* 119 S. Ct. 1450 (1999)*, aff'g* 19 F. Supp.2d 1081 (C.D. Cal. 1998) (protecting anonymous denizens of a web site at www.annoy.com, a site "created and designed to annoy" legislators through anonymous communications); *Global Telemedia v. Does*, 132 F. Supp.2d 1261 (C.D. Cal. 2001) (striking complaint based on anonymous postings on Yahoo! message board based on California's anti-SLAPP statute); *Doe v. 2TheMart.com*, 140 F. Supp.2d 1088, 1092-1093 (W.D. Wash. 2001); *Hollis-Eden Pharmaceutical Corp. v. Angelawatch*, GIC 759462 (Cal. Super. San Diego Cy., March 20, 2001), unofficially published at http://www.citizen.org/litigation/briefs/holldec.pdf, *appeal dismissed*, No. D037907 (Cal. App. 4th Dist.).

Internet speakers may choose to speak anonymously for a variety of reasons. They may wish to avoid having their views stereotyped according to their racial, ethnic or class characteristics, or according to their gender. They may be associated with an organization but want to express an opinion of their own, without running the risk that, despite the standard disclaimer against attribution of opinions to the group, readers will assume that the group feels the same way. They may be discussing embarrassing subjects and may want to say or imply things about themselves that they are unwilling to disclose otherwise. And they may wish to say things that might make other people angry and stir a desire for retaliation. Whatever the reason for wanting to speak anonymously, the

impact of a rule that makes it too easy to remove the cloak of anonymity is to deprive the marketplace of ideas of valuable contributions.

Moreover, at the same time that the Internet gives individuals the opportunity to speak anonymously, it creates an unparalleled capacity to monitor every speaker and discover his or her identity. That is because the technology of the Internet is such that any speaker who sends an e-mail or visits a website leaves behind an electronic footprint that can, if saved by the recipient, provide the beginning of a path that can be followed back to the original sender. *See* Lessig, *The Law of the Horse*, 113 Harv. L. Rev. 501, 504-505 (1999). Thus, anybody with enough time, resources and interest, if coupled with the power to compel the disclosure of the information, can learn who is saying what to whom. As a result, many informed observers have argued that the law should provide special protections for anonymity on the Internet. *E.g.*, Post, *Pooling Intellectual Capital: Thoughts of Anonymity, Pseudonymity, and Limited Liability in Cyberspace*, 1996 U. Chi. Legal F. 139; Tien, *Innovation and the Information Environment: Who's Afraid of Anonymous Speech? McIntyre and the Internet*, 75 Ore. L. Rev. 117 (1996).

A court order, even when issued at the behest of a private party, constitutes state action and hence is subject to constitutional limitations. *New York Times Co. v. Sullivan*, 364 U.S. 254, 265 (1964); *Shelley v. Kraemer*, 334 U.S. 1 (1948). The Supreme Court has held that a court order to compel production of individuals' identities in a situation that would threaten the exercise of fundamental rights "is subject to the closest scrutiny." *NAACP v. Alabama*, 357 U.S. 449, 461 (1958); *Bates v City of Little Rock*, 361 U.S. 516, 524 (1960). The Court has acknowledged that abridgement of the rights to speech and press, "even though unintended, may inevitably follow from varied forms of governmental action," such as compelling the production of names. *NAACP v.*

Alabama, 357 U.S. at 461. The Court noted that rights may also be curtailed by means of private retribution following such court-ordered disclosures. *Id*. at 462-463; *Bates*, 361 U.S. at 524. The novelty of the procedural requirements at issue cannot be used to thwart consideration of the constitutional issues involved. *NAACP v. Alabama*, 357 U.S. at 457. Instead, the Court held, due process requires the showing of a "subordinating interest which is compelling" where, as here, compelled disclosure threatens a significant impairment of fundamental rights. *Bates*, 361 U.S. at 524; *NAACP v. Alabama*, 357 U.S. at 463. Because compelled identification trenches on the First Amendment right of anonymous speakers to remain anonymous, justification for an incursion on that right requires proof of a compelling interest, and beyond that, the restriction must be narrowly tailored to serve that interest. *McIntyre v. Ohio Elections Comm.*, *supra*, 514 U.S. at 347.

In a closely analogous area of law, courts have evolved a standard for the compelled disclosure of the sources or libelous speech, recognizing a qualified privilege against disclosure of such otherwise anonymous sources. In such cases, many courts apply a three-part test, under which the person seeking to identify the anonymous speaker has the burden of showing that (1) the issue on which the material is sought is not just relevant to the action, but goes to the heart of its case; (2) disclosure of the source to prove the issue is "necessary" because the party seeking disclosure is likely to prevail on all the other issues in the case, and (3) the discovering party has exhausted all other means of proving this part of its case. *Carey v. Hume,* 492 F.2d 631 (D.C. Cir. 1974); *Cervantes v. Time,* 464 F.2d 986 (8th Cir. 1972); *Baker v. F&F Investment*, 470 F.2d 778, 783 (2d Cir. 1972); *Garland v. Torre*, 259 F.2d 545, 550-551 (2d Cir. 1958); *Richards of Rockford v. PGE*, 71 F.R.D. 388, 390-391 (N.D. Cal. 1976). This Court, discussing a claimed reporters privilege to refrain from identifying sources to a grand jury, cited with approval the First Circuit's decision about

the disclosure of sources in the civil context in *Bruno & Stillman v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980) (requiring balancing test but eschewing rigid test based on three factors), *cited in dictum*, *In re Letellier*, 578 A.2d 722, 726 (Me.1990).

As one court stated in refusing to enforce a subpoena to identify anonymous Internet speakers whose identity was allegedly relevant to defense against a shareholder derivative action, "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." *Doe v. 2theMart.com*, 140 F. Supp.2d 1088, 1093 (W.D. Wash. 2001).

B. Application of the Qualified Privilege for Anonymous Speech to Develop a Standard for the Identification of John Doe Defendants.

In a number of recent cases, other courts have drawn on the privilege against revealing sources to enunciate a similar standard for protecting against the identification of anonymous Internet speakers, while adapting the standard to conform to the different posture of such cases. The leading case is *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (App. Div. 2001), a case in which a private company sued four individuals who had made a variety of remarks about it on a bulletin board maintained by Yahoo! That court enunciated a five-part standard for cases involving subpoenas to identify anonymous Internet speakers, which amici urge the Court to apply in this case:

> We offer the following guidelines to trial courts when faced with an application by a plaintiff for expedited discovery seeking an order compelling an ISP to honor a subpoena and disclose the identity of anonymous Internet posters who are sued for allegedly violating the rights of individuals, corporations or businesses. The trial court must consider and decide those applications by striking a balance between the well-established First Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interests and reputation through the assertion of recognizable claims based on the actionable conduct of the anonymous, fictitiously-named defendants.

We hold that when such an application is made, the trial court should first require the plaintiff to undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure, and withhold action to afford the fictitiously-named defendants a reasonable opportunity to file and serve opposition to the application. These notification efforts should include posting a message of notification of the identity discovery request to the anonymous user on the ISP's pertinent message board.

The court shall also require the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech.

The complaint and all information provided to the court should be carefully reviewed to determine whether plaintiff has set forth a prima facie cause of action against the fictitiously-named anonymous defendants. In addition to establishing that its action can withstand a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to R. 4:6- 2(f), the plaintiff must produce sufficient evidence supporting each element of its cause of action, on a prima facie basis, prior to a court ordering the disclosure of the identity of the unnamed defendant.

Finally, 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.

The application of these procedures and standards must be undertaken and analyzed on a case-by-case basis. The guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue.

Dendrite v. Doe, 342 N.J. Super. 134, 141-142, 775 A.2d 756, 760-761 (App. Div. 2001).[1]

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[1] *Dendrite* has received a largely favorable reception among commentators. *E.g.*, O'Brien, *Putting a Face to a Screen Name: The First Amendment Implications of Compelling ISP's to Reveal the Identities of Anonymous Internet Speakers in Online Defamation Cases*, 70 Fordham L. Rev. 2745 (2002); Reder & O'Brien, *Corporate Cybersmear: Employers File John Doe Defamation Lawsuits Seeking the Identity of Anonymous Employee Internet Posters*, 8 Mich. Telecomm. & Tech. L. Rev. 195 (2001); Furman, *Cybersmear or Cyberslapp: Analyzing Defamation Suits Against Online John Does as Strategic Lawsuits Against Public Participation*, 25 Seattle U. L. Rev. 213 (2001); Spencer, *Cyberslapp Suits and John Doe Subpoenas: Balancing Anonymity and Accountability in Cyberspace*, 19 J. Marshall J. Computer & Info. L. 493 (2001).

A similar approach was used in *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999), where the plaintiff sued several defendants who had registered Internet domain names that used the plaintiff's trademark. The court expressed concern about the possible chilling effect that such discovery could have:

> People are permitted to interact pseudonymously and anonymously with each other so long as those acts are not in violation of the law. This ability to speak one's mind without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate . . . . People who have committed no wrong should be able to 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 identities.
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> *Id*. at 578.

Accordingly, the *Seescandy* court required the plaintiff to make a good faith effort to communicate with the anonymous defendants and provide them with notice that the suit had been filed against them, thus assuring them an opportunity to defend their anonymity. The court also compelled the plaintiff to demonstrate that it had viable claims against such defendants. *Id*. at 579. This demonstration included a review of the evidence in support of the trademark claims that the plaintiff was bringing against the anonymous defendants. *Id.* at 580.

Similarly, in *Melvin v. Doe*, 49 PaD&C4th 449 (2000), *rev'd on other grounds*, 575 Pa. 264, 836 A.2d 42 (2003) the court ordered disclosure only after finding genuine issues of material fact requiring trial. In reversing the order of disclosure, the Pennsylvania Supreme Court expressly recognized the right to speak anonymously and sent the case back for a determination of whether, under Pennsylvania libel law, actual economic harm must be proved as an element of the cause of action:

> the court-ordered disclosure of Appellants' identities presents a significant possibility of trespass upon their First Amendment rights. There is no question that generally,

> the constitutional right to anonymous free speech is a right deeply rooted in public policy that goes beyond this particular litigation, and that it falls within the class of rights that are too important to be denied review. Finally, it is clear that once Appellants' identities are disclosed, their First Amendment claim is irreparably lost as there are no means by which to later cure such disclosure.
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> 836 A.2d at 50.

In another case similar to this one, the Virginia Circuit Court for Fairfax County considered a subpoena for identifying information of an AOL subscriber. The subscriber did not enter an appearance, but AOL argued for a standard that would protect its subscribers against needless piercing of their protected anonymity. The court required plaintiff to submit the actual Internet postings on which the defamation claim was based, and then articulated the following standard for disclosure: The court must be

> satisfied by the pleadings or evidence supplied to that court . . . that the party requesting the subpoena has a legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where suit was filed, and . . . the subpoenaed identity information [must be] centrally needed to advance that claim.
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> *In re Subpoena Duces Tecum to America Online,* 52 Va. Cir. 26, 34, 2000 WL 1210372 (Va. Cir. Fairfax Cy. 2000), *rev'd on other grounds sub nom., America Online v. Anonymous Publicly Traded Co.*, 261 Va. 350, 542 S.E.2d 377 (2001).[2]

Even more recently, a Connecticut court applied a balancing test to decide whether it was appropriate to compel Time-Warner Cable Co. to identify one of its subscribers, who was accused

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[2] Two unreported decisions, copies of which are attached to this brief, also reached results similar to *Dendrite*. A decision applying Canadian common law required the plaintiff to present evidence in support of its defamation claim before ordering enforcement of a subpoena for the identity of a John Doe defendant. *Irwin Toy, Ltd. v. Doe*, No. 00-CV-195699 CM (September 6, 2000). The Ontario Superior Court of Justice ruled that mere allegations were not sufficient, because otherwise anonymity on the Internet would be too easily shattered based on spurious claims. *See also Varian Medical Systems v. Delfino*, No. CV 780187 (Cal. Super., Santa Clara Cy.) (refusing to allow subpoena to identify anonymous posters who criticized Doe defendants on Yahoo! message board because of right to speak anonymously on Internet).

of defaming the plaintiff. *La Societe Metro Cash & Carry France v. Time Warner Cable*, 2003 WL 22962857, 36 Conn. L. Rptr. 170 (Conn.Super. 2003). The Court took testimony from one of the plaintiff's officials, who attested both to the falsity of the defendant's communication and to the damage that the communication has caused. Drawing on such cases as *America Online*, *supra*, and *Doe v. 2TheMart.Com*, 140 F.Supp.2d 1088 (W.D.Wash 2001), that court decided that the evidence was sufficient to establish "probable cause that it has suffered damages as the result of the tortious acts of defendant Doe," at *7, and therefore ordered identification.

Although each of these cases sets out a slightly different standard, each requires the courts to weigh the plaintiff's interest in obtaining the name of the person that has allegedly violated its rights against the interests implicated by the potential violation of the First Amendment right to anonymity, thus ensuring that First Amendment rights are not trammeled unnecessarily. Put another way, the qualified privilege to speak anonymously requires courts to review a would-be plaintiff's claims and the evidence supporting them to ensure that the plaintiff has a valid reason for piercing the speaker's anonymity.[3]

C. The Procedures That Courts Should Follow in Deciding Whether to Require Identification of John Doe Defendants in Particular Cases.

In this portion of the brief, amici explain in detail the five steps that courts should follow in deciding whether to allow the plaintiff to compel the identification of an anonymous Internet speaker. In amici's view, the trial court sought to follow four of the five steps; however, its

[3]In the court below, plaintiff acknowledged a number of these cases and argued that the Cable Act should not be construed to give greater protection for anonymity that would be accorded to subscribers to dial-up or other forms of broadband Internet subscribers. App. 44-45. By the same token, however, subscribers to cable ISP's should not be accorded less protection than is given pursuant to First Amendment principles to the users of other forms of Internet access.

application of the fourth step was faulty, and its failure to follow the fifth step by balancing the equities between the two parties before issuing the order under appeal is the principal flaw in the decision below.

1. Give Notice of the Threat to Anonymity and an Opportunity to Defend It.

The first thing that a court should do when it receives a request for permission to subpoena an anonymous Internet speaker is to ensure that the plaintiff has undertaken the best efforts available to him to notify the speakers that they are the subject of a subpoena, and then withhold any action for a reasonable period of time until the defendants have had the time to retain counsel. *Seescandy*, 185 F.R.D. at 579. Thus, in *Dendrite*, the Court required the plaintiff to post on the message board a notice of an application for discovery to identify anonymous message board critics. The notice identified the four screen names that were sought to be identified, and provided information about the local bar referral service so that the individuals concerned could retain counsel to voice their objections, if any. (The posted Order to Show Cause, as it appears in the Appendix in the *Dendrite* appeal, is appended to this brief)**.** The Appellate Division specifically approved of this requirement and ordered trial judges in New Jersey to follow it. 342 N.J. Super. at 141, 775 A.2d at 760. Because, in a suit over anonymous speech, preliminary injunctive relief would ordinarily be barred by the rule against prior restraints, and the only relief sought is an award of damages, there is rarely any reason for expedition that counsels against requiring such notice and opportunity to object. A concomitant of the requirements of providing notice to the anonymous defendant and of identifying the specific statements alleged to be actionable is that enough time must be allowed to respond to the allegedly unlawful statements – ordinarily, at least as much time as would be allowed after receipt of a motion for summary judgment.

In this case, it would have been quite simple for the plaintiff to have notified defendant Doe of the pendency of his action and of its effort to identify Doe. Because plaintiff is complaining about the contents of an email sent from the email address fitchisland@hotmail.com, plaintiff could easily have send a copy of his complaint and his motion for disclosure of subscriber information to that address. Although such transmission is not tantamount to service of a summons, it would have represented Doe's best efforts to provide fair notice to his adversary. In future cases, it is suggested that courts should not entertain motions to identify anonymous Internet speakers until they are assured that comparable efforts have been made.

Court-ordered notice was not necessary in this case, because, like most cable Internet providers, Time Warner provides notice to subscribers when their personal information is being sought by a subpoena from a court just as they would if the information is being sought on the authority of any other government entity. Many major Internet service providers ("ISP") who provide access by dial-up, broadband or satellite do likewise, and in fact the Cyberslapp Coalition of which amici are a part have proposed a model notification policy for ISP's to follow. This policy, which is posted on line at www.cyberslapp.org/ISPLetter.cfm, is attached to this brief. However, some ISP's still do not provide notice to their customers before they respond to subpoenas. Moreover, the ISP should be held harmless against the cost of notification, which the person seeking the discovery should be directed to reimburse. Accordingly, an order such as the one that was entered and affirmed in *Dendrite* provides an important procedural protection for the right to speak anonymously.

2. Require Specificity Concerning the Statements.

The qualified privilege to speak anonymously requires a court to review the plaintiff's claims

and the evidence supporting them to ensure that plaintiff does, in fact, have a valid reason for piercing each speaker's anonymity. Thus, the second part of the standard for such cases is that the court should require the plaintiff to set forth the exact statements by each anonymous speaker that is alleged to have violated its rights. It is startling how often plaintiffs in these sorts of cases do not bother to do this. Instead, they may quote one or two messages by a few individuals, and then demand production of a larger number of identities.

In this case, plaintiff appended the email on which his complaint is primarily based for that the Court can examine the allegedly tortious contents. However, the complaint also alleges that this email is part of a larger pattern of harassment, without describing any of the other communications that are part of this broader pattern. App 9 ¶ 7. Because the single email that has been provided is so facially innocuous, it is possible that, in order to meet the later parts of the standard that amici are proposing, Fitch will need to rely on the existence of other tortious communications in order to justify discovery. If so, the Court should demand that all allegedly actionable communications be produced.

3. Review the Facial Validity of the Claims After the Statements Are Specified.

Third, the court should review each statement to determine whether it is facially actionable. For example, it is highly dubious that plaintiffs' claims of violation of privacy or of placing plaintiff in a false public light meet the standards for those causes of action enunciated by this Court in such cases as *Nelson v. Maine Times*, 373 A.2d 1221, 1223 (Me. 1976) and *Cole v. Chandler*, 2000 Me. 104, 752 A.2d 1189, 1196 (2000). *See also Veilleux v. NBC*, 206 F3d 92, 131-135 (1st Cir. 2000). And the vague allegations of emotional distress may founder on the rule that "infliction of emotional distress" is not a mechanism for circumventing established limitations on other tort causes of action.

Id. at 129-131, *citing Devine v. Roche Biomedical Labs.*, 637 A.2d 441 (1994). Moreover, although the complaint appears to allege some of the elements of a defamation claim, App 9 ¶ 10, App. 10 ¶ 16, the attempt to allege "fraud" in order to avoid the constitutional limits on defamation claims cannot succeed. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). And, in turn, to the extent that Fitch is alleging a defamation claim, the contention that the cartoon presents Fitch's wife in a "disrespectful" manner smacks of constitutionally protected opinion. *Fortier v. IBEW Local 2327*, 605 A.2d 79, 80 (Me.1992); *Caron v. Bangor Pub. Co.*, 470 A.2d 782, 784-785 (Me. 1984).

On the other hand, we agree that "identify theft " is a serious nation problem, *e.g., Remsburg v. Docusearch,* 816 A.2d 1001 (N.H.2003), and although we have found no Maine cases on the question, it may be that some levels of identity theft might found to be actionable. To be sure, there is reason to question whether a single email that is designed to falsely imply transmission from the plaintiff is sufficient to constitute identity theft. *Express One Int'l v. Steinbeck*, 53 SW3d 895 (Tex. App. 2003). *Cf. Duane Reade v. UFCW Local 338*, 3 Misc.3d 405, 777 N.Y.S.2d 231, 240 (N.Y. Sup.2003). Before this Court can decide whether this one email meets the legal standards for an identity theft cause of action, it would first have to decide what those elements are. Then, the parties can discuss on remand whether the allegations in the complaint meet the relevant standards.

4. Require an Evidentiary Basis for the Claims.

Fourth, no person should be subjected to compulsory identification through a court's subpoena power unless the plaintiff produces sufficient evidence supporting each element of its cause of action to show that it has a realistic chance of winning a lawsuit against each Doe defendant. The requirement of presenting evidence prevents a plaintiff from being able to identify its critics simply by filing a facially adequate complaint. In this regard, plaintiffs often claim that

they need identification of the defendants simply in order to proceed with their case. However, the Court should recognize that identification of an otherwise anonymous speaker is a major form of **relief** in cases like this, and relief is generally not awarded to a plaintiff unless it comes forward with evidence in support of its claims. Withholding relief absent evidence is particularly appropriate where the relief itself may undermine, and thus violate, the defendant's First Amendment right to speak anonymously.

Indeed, in a number of cases, plaintiffs have succeeded in identifying their critics and then sought no further relief from the court. Thompson, *On the Net, in the Dark, California Law Week*, Volume 1, No. 9, at 16, 18 (1999) (copy attached). Some lawyers who bring cases like this one have publicly stated that the mere identification of their clients' anonymous critics may be all they desire to achieve in court. *E.g.,* http://www.zwire.com/site/news.cfm?newsid=1098427&BRD =1769&PAG=461&dept_id=74969&rfi=8 (copy attached). One of the leading advocates of using discovery procedures to identify anonymous critics has urged corporate executives to use discovery first, and only decide whether to sue for libel after the critics have been identified and contacted privately. Fischman, *Your Corporate Reputation Online* (copy attached); Fischman, *Protecting the Value of Your Goodwill from Online Assault,* (copy attached). Lawyers who represent plaintiffs in these cases also urged companies to bring suit, even if they do not intend to pursue the action to a conclusion, because "[t]he mere filing of the John Doe action will probably slow the postings." Eisenhofer and Liebesman, *Caught by the Net*, 10 Business Law Today No. 1 (Sept./Oct. 2000), at 46. These lawyers similarly suggest that clients decide whether it is worth pursuing a defamation action only after finding out who the defendant is. *Id.*

As Eisenhofer and Liebesman acknowledge, even the pendency of a subpoena may have the

effect of deterring other members of the public from discussing the public official who has filed the action. However, imposition of a requirement that proof of wrongdoing be presented to obtain the names of the anonymous critics, and not just to secure an award of damages or other relief, may well persuade plaintiffs that such subpoenas are not worth pursuing unless they are prepared to pursue litigation.

To address this potential abuse, the Court should borrow by analogy the holdings of cases involving the disclosure of anonymous sources that require a party seeking discovery of information protected by the First Amendment to show that there is reason to believe that the information sought will, in fact, help its case. *In re Petroleum Prod. Antitrust Litig.*, 680 F.2d 5, 6-9 (2d Cir. 1982); *Richards of Rockford v. PGE*, 71 F.R.D. 388, 390-391 (N.D. Cal. 1976). *Cf. Schultz v. Reader's Digest*, 468 F. Supp. 551, 566-567 (E.D. Mich. 1979). In effect, the plaintiff should be required to meet the summary judgment standard of creating genuine issues of material fact on all issues in the case, including issues with respect to which it needs to identify the anonymous speakers, before it is given the opportunity to obtain their identities. *Cervantes v. Time*, 464 F.2d 986, 993-994 (8th Cir. 1972). "Mere speculation and conjecture about the fruits of such examination will not suffice." *Id.* at 994.

If the plaintiff cannot come forward with concrete evidence sufficient to prevail on all elements of its case on subjects that are based on information within its own control, there is no need to breach the anonymity of the defendants. *Bruno v. Stillman*, 633 F.2d 583, 597 (1st Cir. 1980); *Southwell v. Southern Poverty Law Center*, 949 F. Supp. 1303, 1311 (W.D. Mich. 1996). The requirement that there be sufficient evidence to prevail against the speaker to overcome the interest in anonymity is part and parcel of the requirement that disclosure be "necessary" to the prosecution

of the case, and that identification "goes to the heart" of the plaintiff's case. If the case can be dismissed on factual grounds that do not require identification of the anonymous speaker, it can scarcely be said that such identification is "necessary."

The extent to which a proponent of compelled disclosure of the identity should be required to offer proof to support each of the elements of its claims at the outset of its case, to obtain an injunction compelling the identification of the defendant, varies with the nature of the element. On many issues in suits for tortious speech, several elements of the plaintiff's claim will ordinarily be based on evidence to which the plaintiff is likely to have easy access, even access that is superior to the defendant. For example, the plaintiff is likely to have ample means of proving that a statement is false. Thus, it is ordinarily proper to require a plaintiff to present proof of this elements of its claims as a condition of obtaining or enforcing a subpoena for the identification of a Doe defendant. The same is true with respect to the proof of damages. A plaintiff should have ample means of proving its damages or other harm without need of discovery from the defendant.

5. Balance the Equities.

Even after the Court has satisfied itself that the speaker has made an actionable statement,

> the final factor to consider in balancing the need for confidentiality versus discovery is the strength of the movant's case . . .. If the case is weak, then little purpose will be served by allowing such discovery, yet great harm will be done by revelation of privileged information. In fact, there is a danger in such a case that it was brought just to obtain the names . . ... On the other hand, if a case is strong and the information sought goes to the heart of it and is not available from other sources, then the balance may swing in favor of discovery if the harm from such discovery is not too severe.
> *Missouri ex rel. Classic III v. Ely*, 954 S.W.2d 650, 659 (Mo. App. 1997).

Just as the Missouri Court of Appeals approved such balancing in a reporters' source disclosure case, the *Dendrite* court called for such individualized balancing when the plaintiff seeks to compel

identification of an anonymous Internet speaker:

> 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.
>
> The application of these procedures and standards must be undertaken and analyzed on a case-by-case basis. The guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue.
>
> *Dendrite v. Doe*, 342 N.J. Super. 134, 141-142, 775 A.2d 756, 760-761 (App. Div. 2001).

The adoption of a standard comparable to the test for grant or denial of a preliminary injunction, considering the likelihood of success and balancing the equities, is particularly appropriate because an order of disclosure is an injunction, and denial of a motion to identify the defendant does not compel dismissal of the complaint, but only defers the ultimate disposition of the case. Apart from the fact that, under the *New York Times* line of cases, "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters," *Gertz v. Welch*, 418 U.S. 323, 341 (1974), the issue at this stage of the case is not whether the action should be dismissed or judgment granted rejecting the tort claims in the complaint, but simply whether a sufficient showing has been made to overcome the right to speak anonymously.

Denial of a motion to enforce a subpoena identifying the defendant does not terminate the litigation, and hence is not comparable to motion to dismiss or a motion for summary judgment. At the very least, the plaintiff retains the opportunity to renew her motion after submitting more evidence. In this case, for example, it is apparent that the plaintiff made a tactical decision not to reveal at her deposition any evidence that she might have of impact on her reputation or other harm; if her motion for disclosure were denied for lack of evidence, she might well decide to reveal more

of her hand (assuming that such evidence exists). Moreover, as in this case, after the anonymous defendant appears through counsel, the court can order that attorney to accept substituted service and the case can go forward. And, because the case has not been dismissed, the plaintiff can pursue discovery from third parties and possibly from the anonymous defendant, as she attempts to develop sufficient evidence to warrant an order identifying the speaker.

However, a refusal to quash a subpoena for the name of an anonymous speaker causes irreparable injury, because once a speaker loses her anonymity, she can never get it back. Moreover, any violation of an individual speaker's First Amendment rights constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373-374 (1976). Indeed, these injuries are magnified where the speaker faces the threat of economic or other retaliation. If, for example, the person whom the plaintiff seeks to identify is employed by someone over whom the plaintiff exercises influence or control, the defendant could lose a great deal from identification, even if the plaintiff has a wholly frivolous lawsuit.

On the other side of the balance, the Court should consider the strength of the plaintiff's case and her interest in redeeming her reputation. In this regard, the Court can consider not only the strength of the plaintiff's evidence but also the nature of the allegations and their propensity to case damage to important interests. In a case such as *Biomatrix v. Costanzo,* Docket No. BER-L-670-00 (N.J. Super., Bergen Cy.), where the anonymous poster alleged that the head of a biotech company was a doctor who had collaborated with the Nazis in their heinous medical experiments, or *Hvide v. Doe*, Case No. 99-22831 CA01 (Fla. Cir. Ct, 11th Judicial Cir., Dade Cy.), where the defendant claimed that the head of the company was guilty of embezzling corporate funds and the plaintiff lost his job as a result of the claims, or *HealthSouth Corp. v. Krum,* Case No. 98-2812 (Pa. Ct. C.P.

1998), where the poster claimed that he was having an affair with the CEO's wife, a court will have little difficulty in recognizing a real defamation case and weighing the plaintiff's interest in disclosure quite heavily.

In this case, there is little to be weighed on either side of the balance. On the face of the mail over which this action has been filed, it is hard to see more than a childish prank, deserving little weight under the First Amendment but also giving little weight to the plaintiff's claimed need to identify its sender. Plaintiff's allegation that the email is part of a pattern of harassing behavior, and his assertion that this email is connected to "longstanding disagreements" among the members of a community association, App. 25, seems to suggest that there is more going on in this case than might otherwise meet the eye. Whether that "something more" constitutes some sort of protected criticism, on the one hand, or genuinely improper behavior that is properly made the subject of a tort claim, is something on which the parties should be given the opportunity to develop the record on remand.

* * *

The principal advantage of the *Dendrite* test, which amici commend for adoption by this Court, is its flexibility. It attempts to balance the relative interests of the plaintiff who claims that her reputation has been unfairly besmirched against the interest in anonymity of the Internet speaker who claims to have done no wrong, and provides for a preliminary determination based on a case-by-case, individualized assessment of the equities. It avoids creating a false dichotomy between protection for anonymity and the right of tort victims to be compensated for their losses. It ensures that online speakers who make wild and outrageous statements about public figures or private individuals or companies will not be immune from identification and from being brought to justice,

while ensuring at the same time that persons with legitimate reasons for speaking anonymously while making measured criticisms will be allowed to maintain the secrecy of their identity as the First Amendment allows.

The *Dendrite* test also has the advantage of discouraging the filing of unnecessary lawsuits. In the first few years of the Internet, hundreds or even thousands of lawsuits were filed seeking to identify online speakers, and the enforcement of subpoenas in those cases was almost automatic. Consequently, many lawyers advised their clients to bring such cases without being serious about pursuing a defamation claim to judgment, on the assumption that a plaintiff could compel the disclosure of its critics simply for the price of filing a complaint. ISP's have reported some staggering statistics about the number of subpoenas they have received – AOL's amicus brief in the lower court reported the receipt of 475 subpoenas in a single fiscal year, and Yahoo! told one judge at a hearing in California Superior Court that it had received "thousands" of such subpoenas.

Although we have no firm numbers, amici's experience leads them to believe that the number of civil suits being filed to identify online speakers has dropped dramatically. We credit the decisions in *Dendrite*, *Melvin*, *2TheMart.com*, *Seescandy* and other cases that have adopted strict legal and evidentiary standards for defendant identification with sending a signal to would-be plaintiffs and their counsel to stop and think before they sue. At the same time, the publicity given to these lawsuits, to the occasional libel verdict against originally anonymous defendants, as well as the fact that many online speakers have been identified in cases that meet the *Dendrite* standards (indeed, two of the Doe defendants in *Dendrite* were identified), has discouraged the sort of Wild West atmosphere, cited by plaintiff in her brief below, at 17, that originally encouraged some of the more egregious examples of online defamation. We urge the Court to preserve this balance by

adopting the *Dendrite* test that balances the interests of defamation plaintiffs to vindicate their rights in meritorious cases against the right of Internet speaker defendants to maintain their anonymity when their speech is not actionable.

D. The Absence of Consent to Disclosure in the Privacy Notice.

The Superior Court found no reason to decide whether disclosure was otherwise appropriate because it construed the standard "Subscriber Privacy Notice" to provide consent to disclosure pursuant to a civil subpoena. This ruling was error.

The Subscriber Privacy Notice stated that the ISP

> may also disclose, pursuant to the consent you granted in your Subscription Agreement, . . . personally identifiable information . . . to comply with criminal or civil legal process (including as described in Section 3 of this Notice).

Section 3, in turn, includes the following:

> [A] private party may use a subpoena under the Copyright Act to obtain information about you to maintain an infringement suit against the poster of online material, without any notice to you. Additionally, our Affiliated ISPs may release information about you to comply with valid legal process such as a subpoena or court order, or as required by law.

Strictly speaking, these terms are not contained in a contract at all, but rather in a "notice" of privacy policies. In the court below, Fitch inferred that, because the Privacy Policy made reference to the subscriber's agreement, the agreement itself must necessarily have referred back to the policy and Doe must have entered into that agreement. Typically, in the experience of amici, that would be true, although many such "agreements" are adhesion contracts to which subscribers commonly agree by clicking a button without ever reading the underlying document. Even if such agreements can be enforced by the ISP against the subscriber as a contractual matter, that does not mean that the subscriber should be held to have waived the underlying constitutional right to retain

anonymity for his speech. And, in particular, without knowing the precise circumstances, this Court is not in a position to decide to what extent it is fair to find a knowing waiver. That is a matter that should be explored on remand.[4]

Moreover, although provisions like these are standard in all ISP Privacy Policies, they are written to protect ISP's against liability for disclosing personally identifiable information when they are required to do so by law. They are not written for the benefit of persons serving subpoenas and do not constitute any agreement that personal information, otherwise protected by law, can be disclosed. That is why Section 3 expressly requires that, before information will be disclosed, the ISP must be subject to "valid legal process" or be "required by law" to make the disclosure. It is circular to apply this language to find consent to disclosure even if the subpoena should not be enforced because it would violate the First Amendment.

Indeed, in each of the cases discussed in Section B of this memorandum, the ISP's that were subpoenaed to identify the Doe Internet speakers had Privacy Policies or Terms of Service similar to those cited by plaintiff here, and the plaintiffs in many of those cases argued that those rules showed that the Doe Internet users in those cases had no expectation of privacy or anonymity because they knew that their identities were subject to being revealed pursuant to subpoena. Those courts rejected that argument, albeit without discussion, for the same reason that the Privacy Policy argument should be denied here. The mere fact that ISP's protect themselves against liability for complying with court orders should not create an open season for identifying anonymous speaker regardless of the lack of merit of the lawsuits in which such identification is sought.

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[4]For example, Fitch is able to obtain discovery about these matters directly from Time Warner, even before Fitch has been able to identify Doe.

CONCLUSION

The decision below should be vacated, and the case should be remanded to the trial court for further proceedings.

Respectfully submitted,

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