SUPERIOR COURT OF PENNSYLVANIA

MELVIN v. DOE

BRIEF OF APPELLANTS

STATEMENT OF JURISDICTION

The Superior Court is vested with jurisdiction of this appeal pursuant to the Act of July 9, 1976, P.L. 586, No. 142, §2, effective June 27, 1978, as amended, 42 Pa. C.S.A. §742, which provides:

> The Superior Court shall have exclusive appellate jurisdiction of all appeals from final orders of the courts of common pleas, regardless of the nature of the controversy or the amount involved, except such classes of appeals as are by any provision of this chapter within the exclusive jurisdiction of the Supreme Court or the Commonwealth Court.

This appeal is from a "collateral order" which is deemed final under Pa. R.A.P. 313. The Appellant's right of anonymity claimed herein is collateral to the main cause of action, is too important to be denied review, and will be irretrievably lost if review is postponed until final judgment in the case.

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

Appellate courts must exercise independent review of the whole record in cases where First Amendment rights have been infringed. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 513,104 S. Ct. 1949,1966 (1984).

STATEMENT OF THE ORDER IN QUESTION

This appeal arises from the following November 15, 2000 Order of the Court of Common Pleas of Allegheny County:

> On this 15th day of November, 2000, it is ORDERED that:
>
> (1) except as provided for in paragraph (2), defendants' motion for a protective order is denied; and
>
> (2) discovery related to the identity of the defendants shall be subject to a confidentiality order, which the parties shall prepare, consistent with the Opinion which accompanies this court order.
>
> /s/ Wettick, J.

A copy of the Order is provided herewith as "Appendix 1."

A copy of the trial court's Opinion, also dated November 15, 2000, is provided herewith as "Appendix 2." The Opinion has not yet been reported in an official reporter.

STATEMENT OF THE QUESTIONS INVOLVED

Whether the chilling effect of unmasking citizens who have anonymously criticized the conduct of an elected official, before any adjudication on the merits of a libel case, impermissibly restricts freedom of speech.

(Answered in the negative by the court below.)

STATEMENT OF THE CASE

I. Form of Action

This is a civil action for defamation, brought by a government official against "John Doe," an anonymous writer who maintained a personal Web Page devoted entirely to commentary on local politics and politicians. Plaintiff/Appellee is Joan Orie Melvin (hereinafter "Melvin"), a Judge of this Court. The Web Page at issue had commented on political activity and urged readers not to vote for Melvin's retention.

II. Procedural History of the Case

The Web Page at issue in this case appeared in early 1999 on facilities that America Online ("AOL") makes available to its subscribers for the creation of personal Web Pages. AOL is an Internet Service Provider headquartered in Loudon County, Virginia. In March of 1999, Melvin filed a three-paragraph complaint against John Doe in Loudon County Circuit Court, claiming that she was defamed by his Web Page. At the same time, and before any attempt to serve original process, Melvin subpoenaed AOL seeking information that would identify Doe. R.116a. Doe entered a special appearance for the purpose of moving to quash the subpoena to AOL and moving the Virginia Court to dismiss for lack of jurisdiction. These motions were granted on June 24, 1999. R.115a.

On July 9, 1999, Melvin commenced an action against Doe in the Court of Common Pleas of Allegheny County (G.D. No. 99-10264) by writ of summons. Melvin then attempted to serve subpoenas on AOL and the Clerk of the Loudon County, Virginia court seeking information concerning the identity of Doe. On September 7, 1999, the Court of Common Pleas (Wettick, J.) entered an order withdrawing the subpoenas pending the filing of a Complaint, directing Melvin to file a Complaint, and directing Doe to accept service of that Complaint. R.121a.

Melvin filed her Complaint on October 8, 1999 at a new docket number (G.D. 99-16190). After Doe answered, the trial court entered an order consolidating the two actions at the original docket number. R.123a.[1] Thereafter, Doe sought to bifurcate the case, with the parties first addressing all issues that could be tried without disclosure of John Doe's identity. The trial court rejected this approach, explaining that the author's identity was possibly relevant to a jury's determination of the truth or falsity of the published statements, and that Melvin was entitled to know his identity before making the decision whether to undertake the expense and other burdens of a trial. Opinion of November 15, 2000 (Appendix "2" hereto), at 3-4.

Instead, the trial court stayed Melvin's discovery regarding John Doe's identity until Doe had an opportunity to show that Melvin could not make out a prima facie case. Opinion (Appendix "2") at 2-3.

[1] Following the consolidation, Plaintiff continued to file all of her pleadings, motions, etc., not at G.D. 99-10264 as directed by the trial court, but at G.D. 99-16190, thus creating the unusual situation where all of Defendant's filings (but none of Plaintiff's) appear on the correct docket, and all of Plaintiff's filings (but none of Defendant's) appear on a separate, incorrect docket.

During discovery, Melvin refused to answer questions regarding any form of economic harm she might claim to have suffered as the result of Doe's Web Page. In response, the trial court ruled:

> Unless within ten days plaintiff requests that she be given the opportunity to testify as to these matters at a second deposition, in deciding any initial summary judgment motion which defendants file, I will assume that plaintiff would have stated that she had no evidence to support a claim of actual damages with respect to those matters that she declined to answer.

R.129a.

Melvin has never responded to this ruling; it is thus conceded that she has no special damages or economic injury arising from the comments that appeared on John Doe's Web Page.

On May 22, 2000, Doe filed his Motion for Summary Judgment, arguing (as here) that a rule that would breach an author's anonymity:

(a) before any determination that his political comments were false, and

(b) where the public official libel plaintiff has not proven she suffered economic harm,

violates the First and Fourteenth Amendments to the United States Constitution.

On November 15, 2000, the trial court (Wettick, J.) denied Doe's Motion for Summary Judgment and further denied Doe's Motion for (or, perhaps more accurately, terminated the existing) Protective Order regarding Defendant's identity. This timely appeal followed.

III. Statement of Facts

As a duly elected Judge of this Court, Plaintiff/Appellee Joan Orie Melvin is a public official. This action involves a citizen's anonymous comment on her office and her role in the functioning of the government of this Commonwealth:

> Despite being prohibited from engaging in political activity, a couple of Judges have been keeping themselves pretty busy recently with politics. Judge Joan Orie Melvin has been lobbying the Ridge administration on behalf of a local attorney seeking the appointment by Governor Ridge to fill the vacancy on the Allegheny County Court of Common Pleas created by the mandatory retirement earlier this month of Judge Robert Dauer, now a Senior Judge. Dauer has also been actively pushing for this attorney's appointment. The last GS99 heard, this attorney is on the Governor's short-list of candidates. Let's hope that the Gov does the right thing and appoints somebody better qualified. Shame on Orie-Melvin and Dauer – this is exactly the kind of misconduct by our elected officials that the residents of Allegheny County will not stand for anymore … and a good reason why Judges should be held accountable for their actions and remembered at the polls at retention time.

R.23a.

This comment appeared, along with other discussions of local politics, on a privately maintained Internet Web Page identified only as "Grant Street '99," on facilities provided by America Online to its subscribers.[2]

[2] The remainder of the particular edition of Doe's Web Page at issue here contained the following political commentary:

> And speaking of Judges … Cathy Baker Knoll is trying to shove another of her children down our throats again. She is making phone calls to Democratic Committee Chairs and other local elected officials asking them to support her son for one of the six vacancies on the Common Pleas Bench. Her children seem to find the need to change their names specifically for elections – for the purpose of confusing voters, I guess. Charles Knoll, Jr. Is now going by the name of Chuck Knoll – I guess in an attempt to play off of the name of Steelers former headcoach Chuck Noll. You'll remember that Knoll's daughter moved here from New York City and changed her name to Mina *Baker* Knoll in a failed attempt to defeat State Treasurer Barbara Hafer. I think she then moved back to NYC and changed her name back. Allegheny County has had to put up with Cathy Baker Knoll for

The Internet has been described as a "vast democratic forum." *Reno v. ACLU*, 521 U.S. 844, 868, 117 S. Ct. 2329, 2343 (1997). It provides virtually limitless opportunities for discussion and debate, not just on issues of government and politics, but on a range of subjects "as diverse as human thought." *Id.,* 521 U.S. at 852, 117 S. Ct. at 2335. These discussions can take place in email – whether one-to-one or one-to-many – or publicly on discussion bulletin boards, chat rooms, or Web Pages. In forums other than email, a great deal of Internet political discussion is anonymous, R.59a-60a, and is truly "uninhibited, robust and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 721 (1964) (noting our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials").

(continued from previous page)

> nearly a half century in politics and we really don't want or need another Knoll in public life.
>
> We shouldn't worry much that Knoll will win one of the seats, though. He has hired Diana Deep to be his campaign manager. Deep was a longtime political ally of Dr. Cyril Wecht, but they are now bitter enemies. It took Dr. Wecht about 25 years to figure out what everyone familiar with Diana Deep already knew – she is definitely one not to be trusted. Guess he'll find out the hard way this year! But GS99 suspects that the good doctor knows that Deep carries no real political clout. Grant Street insiders know that it is always best to keep their distance from her.
>
> Last Saturday afternoon, County Commissioner Larry Dunn officially kicked-off his campaign for county executive at Nick's Fat City on the South Side. 750 supporters were in attendance for the announcement. Dunn didn't have the so-called corporate elite … but we must remember … as much as Mayor Murphy, Commissioner Dawida and Jim Roddey wish, it is and will not be the corporate elite who elect our next leader. It is finally time for the people of this great county to say NO to the Murphys, Dawidas and Roddeys and YES to a candidate that will work for the people.

R.23a-24a.

Individuals taking part in political debates and a myriad of other discussions on public Internet forums overwhelmingly do so under pseudonyms. *E.g.,* R.59a-60a; 85a-92a. Anonymity serves an important purpose in facilitating open discussions:

> Individual political discussion on the Internet … is frequently anonymous. This is especially common when an individual or group is advocating changes in the criminal law (such as legalization of marijuana or abolition of the death penalty), or is critical of policies, local conditions or officials, or fears social censure (for example, in discussions of homosexuality). The Internet gives individuals the ability to say unpopular things without fear of reprisal from those in power.
> * * *
> For example, anonymity facilitates participation in on-line support groups designed for individuals afflicted with various social, physical or psychological ills. Bink, Yitzchak M., et al., "From the Couch to the Keyboard: Psychotherapy in Cyberspace," in *Culture of the Internet*, Ch. 4, at p. 86; Mickelson, Kristin D., "Seeking Social Support: Parents in Electronic Support Groups," in *Culture of the Internet,* Ch. 8, at p. 176; Davison, Kathryn P., et al., "Who Talks? The Social Psychology of Illness Support Groups," *American Psychologist*, February 2000 Vol. 55, No. 2, 205-217.
> * * *
> Thus, the ability to use the Internet anonymously is seen in the research as facilitating the exchange of a broader range of information than individuals would be willing to exchange if their identities were known. Many people prefer to be anonymous on the Internet, especially when talking about sensitive topics like drug legalization, the death penalty, homosexuality, pornography or AIDS. *See, e.g.,* McKenna, Katelyn Y.A. & Bargh, John A., "Coming Out in the Age of the Internet : Identity 'Demarginalization' Through Virtual Group Participation," *Journal of Personality and Social Psychology*, Vol. 75, No. 3, 681-694 (September, 1998).

R.60a-61a. (Affidavit of Sara Kiesler, Ph.D., Professor of Human Computer Interaction, Carnegie-Mellon University).

The Internet has "very low barriers to entry." *Reno v. ACLU*, 521 U.S. at 863 n.30, 117 S. Ct. at 2340 n. 30. Anyone with a small investment of time and money can

voice his or her views on the Internet. It is thus, like the small yard- or window-placard, "an unusually cheap and convenient form of communication."

> Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute. Even for the affluent, the added costs in money or time of taking out a newspaper advertisement, handing out leaflets on the street, or standing in front of one's house with a handheld sign may make the difference between participating and not participating in some public debate.

City of Ladue v. Gilleo, 512 U.S. 43, 114 S. Ct. 2038, 2046 (1994).[3]

The Internet is also uniquely egalitarian and democratizing: it tends to empower the less powerful and diminish the differences between high and low status groups. R.63a (Affidavit of Professor Kiesler). *See also*, *Reno v. ACLU*, 521 U.S. at 863 n.30, 117 S. Ct. at 2340 n.30 (the Internet "creates a relative parity among speakers"). Indeed, research has shown that "interconnectivity" – the extent to which a country's people are connected to the Internet – is the single most important predictor of a country's level of democracy. R.63a.

At the same time that the Internet offers unparalleled opportunities for free speech, it offers a unique weapon to those who would seek to squelch its wide-open debate. In order to access the Internet, would-be participants must register (typically using a variety of personal identifying information) with a service provider. A subpoena directed to that provider – even in a case against a John Doe who has yet to be served with original process – will uncover the identity of virtually any anonymous speaker. *See*, R. 116a; Trial Court Opinion, p. 1 n.1.

---

[3] The *Gilleo* case was decided approximately one year before the explosive beginning of wide public access to the Internet.

Logic suggests and experience has shown that the plaintiffs in these cases will tend to be the relatively more wealthy and powerful: those who can afford the burdens and cost of commencing litigation. They have frequently been corporations or well placed corporate executives. R.93a. The present case represents one of the first to be brought by an elected government official.

Often, the only purpose of such "John Doe" litigation is to unmask the anonymous critic. R.94a-95a. Such cases may be dismissed once the identity is known – often before the defendant has even been served and before the truth of the published statement has ever been placed at issue. This may be, as the trial court suggested, Opinion at p. 4, because the published statement is effectively rebutted simply by exposing the identity of its author, who will typically have neither the wealth nor the insurance to pay a libel judgment of any size. Or, where the defendant turns out to be an employee or otherwise within the power of the plaintiff, it may be because self-help retaliation is more efficient than pursuing an uncollectable judgment against the unmasked John Doe.

For whichever reason (or a combination of them), the unique features of anonymous Internet speech have brought on a rising tide of lawsuits in which the real purpose and the real prize is unmasking the speaker for the purpose of silencing him and deterring others. R.94a-95a. *See also,* Brief Amicus Curiae of America Online, Inc.

Set against the substantial burden on free speech and on judicial resources that this tide of litigation represents, there is a greatly reduced social interest in regulating Internet political speech through lawsuits that target anonymous individuals. Anonymity is a recognized social cue that what has been said cannot immediately be taken at face

value. R.63a; *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 348 n.11, 115 S. Ct. 1511, 1519 n.11 (1995). This is not to say that anonymous speech is meaningless or unimportant: indeed, history shows the opposite is true. It does mean, however, that anonymous Internet speech is less likely than a traditional newspaper or broadcast report to cause immediate injury before the person criticized has had an opportunity to weigh in with her rebuttal -- a rebuttal that the Internet uniquely makes available immediately.[4] Thus, the statement on a personal Web page by someone known only as "Grant Street '99," that a judge had backed an unnamed judicial candidate is intuitively a world away from a signed declaration in the *New York Times* that police officials had participated in civil rights abuses in 1960s Alabama.

Where the likelihood of any real impact is so drastically reduced, one can expect that the record in many of the emerging flood of Internet libel lawsuits will be completely devoid of objective harm to the plaintiff. This is one such case.

[4] Access to media in which to respond to one's critics is a recognized factor in imposing greater burdens in libel actions brought by public officials. *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 344, 94 S. Ct. 2997, 3009 (1974).

SUMMARY OF THE ARGUMENT

The right to comment anonymously on political matters is an indispensable liberty. Anonymous political advocacy has played a vital role in promoting social change throughout our nation's history, and we recognize that laws that force the identification of those who advocate controversial views will frighten citizens away from and, therefore, stifle legitimate First Amendment activities.

For this reason, State laws - including specifically libel laws - that sweep broadly enough to impose burdens on anonymous political comment that has not been shown to be false are subjected to "exacting scrutiny;" they must be narrowly tailored to achieve an overriding government interest.

The trial court in this case felt constrained by the common law of libel to breach the anonymity of Judge Melvin's anonymous critic, even though the trial court recognized that Doe's criticism caused no economic injury and has never been proved false. The use of libel law to achieve this result does not satisfy exacting scrutiny. The First Amendment does not permit government to deny the right of anonymous political commentary that is not false, where no overriding government interest is thereby served. In the circumstances of the present case there is no overriding government interest. The Supreme Court has ruled that there is a materially reduced governmental interest in protecting elected officials from the discomfort of public scrutiny. Moreover, the Court has said that there is *no* substantial government interest in providing libel awards that exceed any actual injury.

On the other hand, the potential of the trial court's ruling to damage core freedoms of American citizens is grave. The Internet has invigorated free speech in this nation and around the world. It has brought the ability to engage in public political discourse into the home of the common man and woman, and one catalyst in the growth and the health of this free marketplace of ideas is the broadly accepted fact that most individuals participate in Internet political debate using pseudonyms.

The central First Amendment purposes being served in this new forum are fragile: the common person is easily deterred from free speech by the threat of lawsuits and even the threat of losing anonymity. These fragile and important values should not be thrown away lightly. Indeed, this is precisely the common-sense meaning of the legal term "exacting scrutiny."

Therefore, under the circumstances in this case, the First Amendment compels a rule that the public figure plaintiff may not maintain a libel action against an anonymous critic who has caused her no economic harm. No lesser standard can satisfy the requirements of exacting scrutiny. This rule compels that the present action be dismissed without unmasking the anonymous Defendant.

ARGUMENT FOR APPELLANT

I. The right to comment anonymously on political matters is an indispensable liberty.

Many people – perhaps including many judges – initially react negatively to the idea of anonymous speech and anonymous political activity. We are taught to stand behind what we say. But in some important parts of our political and cultural existence, anonymity means freedom. We vote anonymously, Pa. Const., Art. VII, §4, and "the hard-won right to vote one's conscience without fear of retaliation," *McIntyre v. Ohio Elections Commission,* 514 U.S. 334, 343, 115 S. Ct. 1511, 1517 (1995), is such an indispensable part of free elections that it cannot be waived by a voter. *Appeal of Orsatti*, 143 Pa. Commw. 12, 17, 598 A.2d 1341, 1343 (1991).

If our democratic society had rejected the right and the value of anonymity, there might have been no N.A.A.C.P., or at best, a substantially smaller, weaker one. *See, e.g,*, *Bates v. City of Little Rock*, 361 U.S. 516, 80 S. Ct. 412 (1960); *N.A.A.C.P. v. State of Alabama*, 357 U.S. 449, 78 S. Ct. 1163 (1958). We would have rejected, not revered, anonymous letters and pamphlets like *Common Sense, The Federalist Papers,* and other seeds of our freedom, *see Talley v. State of California*, 362 U.S. 60, 62 n.3, 80 S. Ct. 536, 537 n.3 (1960), and the literary works of the likes of Mark Twain, O. Henry, Benjamin Franklin, Voltaire, Charles Dickens and, perhaps, William Shakespeare. *McIntyre*, 514 U.S. at 341 n.4, 115 S. Ct. at 1516 n.4. And we would not have the benefit of the frank and searching peer review of scientific and scholarly research – peer review that is routinely conducted anonymously. *See* R.61a-62a.

Our nation's history is replete with examples demonstrating that individuals may only be able to speak out in favor of important causes when they can do so anonymously. The examples include many of the very issues most crucial to our continued freedom and most central to the First Amendment: issues such as freedom from tyranny, freedom from slavery and freedom from prejudice. As the Supreme Court has observed, "Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all." *Talley v. State of California*, 362 U.S. at 64, 80 S. Ct. at 538. And more recently:

> Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation – and their ideas from suppression – at the hand of an intolerant society.

McIntyre, 115 S. Ct. at 1524 (citation omitted).

That "honorable tradition" certainly includes the famous trial of the printer John Peter Zenger. In 1735, Zenger was charged, tried, and acquitted of seditious libel for refusing to reveal the anonymous authors of pamphlets he had published that were critical of the Crown Governor of New York. *See McIntyre*, 115 S. Ct. at 1526 (Thomas, J., concurring). Zenger is remembered in history and law school classrooms today because he protected anonymous writers and thereby protected the free press that inspired the Colonies.

Anonymous speech, like Doe's Web Page here, that discusses public issues and urges voters to cast or withhold a particular ballot, is at the exact center of the kinds of speech that must be free, and is deserving of the highest degree of First Amendment protection:

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression …. [T]here is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs, … of course includ[ing] discussions of candidates ….

McIntyre, 514 U.S. at 346, 115 S. Ct. at 1518-19.

II. A law that would disclose the identity of a truthful, anonymous critic of government must survive "exacting scrutiny," and the mere averment of falsity by a public official who has not suffered economic harm is not sufficient to satisfy that standard.

It is accepted as a matter of law that government actions that block anonymity will hinder and deter speech and other activities that are protected by the First Amendment. As long ago as 1958, the Supreme Court observed that it was "hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute a restraint on freedom of association." *N.A.A.C.P. v. State of Alabama*, 357 U.S. at 462, 78 S. Ct. at 1171. This is consistent with the undisputed record in the present case, that Internet speech on sensitive topics and by advocates of political and social change *will be* deterred by intrusions on the right of anonymous Internet speech. R.60a-62a.

In order to protect the freedom of speech, the Supreme Court has held that a state law must satisfy "exacting scrutiny" before it will be permitted to unmask anonymous political speech that has not been proven false. *McIntyre,* 514 U.S. at 347, 115 S.Ct. at 1519. The fact that anonymous speech *might* be false, and *if* false, is capable of defamatory meaning, has already been held by the U.S. Supreme Court to

be insufficient to force the identification of an anonymous political commentator whose words might be true.

In *McIntyre v. Ohio Elections Commission*, the Court struck down an Ohio law that forbade all anonymous campaign literature. Ohio had sought to justify its outright ban on anonymity by invoking its legitimate interest in preventing fraud and libel. 514 U.S. at 348, 115 S. Ct. at 1519-20. In other words, forcing the disclosure of every speaker's identity will make it easier to enforce libel and anti-fraud laws, and conversely, allowing anonymous speech may make it impossible to enforce the laws against a pamphleteer who violates them.

The Supreme Court recognized that States have a genuine interest in enforcing their libel laws. *Id.* The Court ruled, however, that this was not sufficient to justify breaching the anonymity of truthful political speech. "When a law burdens core political speech [i.e., discussion of public issues and debate on the qualifications of candidates], we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest." 514 U.S. at 347, 115 S. Ct. at 1519.

Applying this standard, the Supreme Court held that Ohio's attack on anonymity was unconstitutional because (like the result in the lower court here) it attacked core First Amendment speech using means that are over-inclusive; it would prevent some anonymous speech that was true. 514 U.S. at 350-52, 115 S. Ct. at 1521.

Thus, the Supreme Court held that Ohio's interest in its libel laws, while legitimate, did not justify an over-inclusive intrusion upon the right of private citizens to comment on political topics truthfully and anonymously.[5]

III. Current libel law permits the unmasking of truthful anonymous critics

An anonymous defendant's identity will quickly become relevant, and therefore subject to forced disclosure, in a libel case unless some defense for which identity is not a factor can intercede. For example, the trial court here indicated that the familiar *New York Times v. Sullivan* line of cases would provide the same protection to an Internet critic as it would to the traditional media. This is not true, however, for an *anonymous* Internet writer. He cannot take advantage of the rule that public officials must prove his words to have been knowingly false or made with substantial actual doubt of their truth, without first disclosing his identity. Clearly, discovery on the "actual malice" issue cannot proceed without knowing whose state of mind is in question. Simply stated, *New York Times v. Sullivan* and its progeny offer no protection for anonymity.

[5] While the majority did not reach the question, the historical facts recited in a concurring opinion make it clear that the drafters of the First Amendment understood the concept of "freedom of the press" to prevent the government from forcing a printer or publisher to disclose the identity of the anonymous author of a letter or pamphlet critical of the government. Aside from the acquittal of John Peter Zenger, discussed in the text *supra*, the 1784 "Scipio" matter is also instructive. This was the pseudonym used by New Jersey Governor William Livingston in attacking the state's legislature, including accusing one state officer of stealing or losing state funds during the British invasion. Responding to a demand by that officer that the writer identify himself, Livingston wrote (again as "Scipio"):

> I hope [the accused officer] is not seriously bent upon a total subversion of our political system …. And pray may not a man, in a free country, convey thro' the press his sentiments on publick grievances … without being obliged to send a certified copy of the *baptismal register* to prove his name.

McIntyre, 514 U.S. at 362-63, 115 S. Ct. at 1526-27 (Thomas, J., concurring) (emphasis in original).

What is more, if the statute of limitations and jurisdictional requirements are satisfied, and if the anonymous defendant has engaged in *meaningful* criticism of government (that is, he has made a statement that may well be true but, if false, would qualify as defamatory), then the only remotely possible protection for the anonymity of a critic under current libel law is a dispositive pretrial motion raising the issue of truth or falsity. Under current law, however, Plaintiff/Appellee can and did overcome all pretrial motions raising the issue of the truth of the publication simply by stating that she did not do or say what was attributed to her. Plaintiff's mere denial creates a fact issue regarding truth/falsity, requiring a trial, and opening the way to the imminent exposure of the Defendant's identity.

In other words, where the defendant has spoken anonymously, current law puts the onus on the speaker to prove the truth of his statements in order to preserve his right of anonymity. And he must prove truth, not merely by a preponderance of the evidence, but so resoundingly that, on the pretrial record, one would say that no reasonable jury could conclude that the statements were false. This is, by several orders of magnitude, an impermissible burden on speech.

> [I]t has long been established that the government cannot limit speech protected by the First Amendment without bearing the burden of showing that its restriction is justified. … [Even] a private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant.

Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 106 S. Ct. 1558, 1560 (1986). Similarly, the Court has warned that "[a] rule compelling the critic of official conduct to guarantee the truth of all his factual assertions – and to do so on pain of libel judgments

virtually unlimited in amount – leads to … 'self-censorship.'" *Sullivan*, 376 U.S. at 279, 84 S. Ct. at 725 (1964).

Clearly, when no more than Plaintiff's bare, untested assertion of falsity can overcome any possible *pretrial* defense based on "truth" and bring about with certainty the unmasking of an anonymous critic, current law will allow the unmasking of truthful anonymous critics. It will encourage the filing of a flood of lawsuits whose only purpose is to unmask another of the uncounted anonymous speakers on the Internet, because every one of those lawsuits can succeed in its purpose and then be dismissed *even if the claim would prove wholly meritless*. And at least in the absence of an overriding State interest sufficient to justify it, piercing the identity of truthful critics is a plain violation of the First Amendment.

IV. The court below permitted this unconstitutional result based on two clear errors of law.

As expressed in its Opinion, the trial court felt constrained to rule that the right of anonymity could be overcome in a libel action so long as the case involved a publication that would be defamatory *'if untrue."* Opinion of November 15, 2000 (Appendix "2" hereto), p. 7 (emphasis added). The court below realized that no existing rule provided a satisfactory balance in the new context presented by this case, Opinion at p. 20 ("There is not an equivalent balancing for anonymous Internet speech"); 30 ("there is not any particularly satisfactory middle ground"), and therefore felt constrained by the restrictions inherent in the role of a trial court in fashioning new law. Opinion at pp. 20-

21 ("In choosing between these two alternatives, I must recognize state tort law because there is no case law" directly answering the First Amendment paradox in this case).

Even within these perceived constraints, the trial court made no mistake in recognizing the importance of the First Amendment rights at stake, and in expressing undisputed findings that point the way for the appellate courts who would follow in this case. For example, the court below began with the recognition that "[a] plaintiff should not be able to use the rules of discovery to obtain the identity of an anonymous publisher simply by filing a complaint that may, on its face, be without merit." Opinion at p. 2. It recognized that "Federal case law protects anonymity for political speech that is not actionably false," Opinion at p. 6, and that "the John Doe defendant typically lacks the resources necessary to defend against a defamation action." Opinion, at p. 4 n. 4 (citing Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 Duke L.J. 855, 861 (2000)). Significantly, the trial court admitted that current law does not provide a "particularly satisfactory" solution; it was aware that the ruling now on appeal means that "the Internet speaker will lose his or her anonymity even though a jury may ultimately find that (1) the statements were true (or otherwise made in good faith) or (2) the harm rises only to a level of public embarrassment or annoyance," Opinion at 20, and that "the thresholds that I imposed … can be easily met" by any plaintiff who "testifies that the statements are untrue and that she has experienced emotional distress." Opinion at 14.

The trial court correctly observed that there is no *existing* standard that addresses the new challenges of anonymous Internet political speech – a context that is

new but certain to face the courts in ever growing numbers of cases. Doe argues, however, that the economic loss rule in the limited category of libel suits by public figures against anonymous Internet critics *is* compelled by the rationale of existing First Amendment cases and *is not* constrained by State law in the manner expressed by the trial court. Thus, the court below erred in two key respects: (1) it misinterpreted references in the *McIntyre* opinion to the States' interest in enforcing libel law and to the potential that anonymity can be abused, thereby substantially understating the First Amendment protections compelled by that ruling; and (2) it overstated the power (if such power exists) of the common law of libel to delimit the scope of First Amendment freedoms.

First, *McIntyre* expressly disapproved of applying state law to prevent anonymous speech that is not false, where the state rule does not bear a necessary relationship to the danger sought to be prevented. Here, however, the trial court's rule expressly envisions allowing government officials to breach the anonymity of their critics even in cases where the publication *was true*, but would have been defamatory "if untrue," and *regardless* of whether the political speech actually caused any measurable objective harm.

In reaching this result, Doe submits that the court below misinterpreted the *McIntyre* opinion, focusing on language in the opinion (a) acknowledging that States do have a legitimate (but not always overriding) interest in enforcing their libel laws, and (b) acknowledging that the "right to remain anonymous may be abused when it shields fraudulent conduct." 514 U.S. at 357, 115 S. Ct. at 1524 (quoted by the lower court, Appendix "2", p. 8.)

These two statements by the Supreme Court, as they appear in the context of the *McIntyre* opinion, demonstrably do not mean what the trial court inferred.

As noted in a previous section of this brief, the Supreme Court did acknowledge the States' interest in enforcing their libel laws. 514 U.S. at 349, 115 S. Ct. at 1520. ("The state interest in preventing fraud and libel stands on a different footing.") But the Court immediately went on to say authoritatively that this interest *does not* justify a state law that unmasks anonymous authors whose publications are not false. 514 U.S. at 351, 115 S. Ct. at 1521 ("Although these ancillary benefits are assuredly legitimate, we are not persuaded that they justify [Ohio's] extremely broad prohibition" which "encompasses documents that are not even arguably false or misleading.") That, indeed, is why Mrs. McIntyre's conviction was reversed, not affirmed, by the Court. The Court stated that while Ohio's interest in its libel laws was legitimate, Ohio was required to enforce those laws directly without infringing the anonymity of truthful publications. The interest in libel enforcement, the Court wrote, could not justify breaching a true publication's anonymity "as an aid to enforcement of" the law or as "a deterrent to the making of false statements by unscrupulous prevaricators." 514 U.S. at 350-51, 115 S. Ct. at 1520-21. Yet this is exactly the unconstitutional result that the court's decision below would permit.

Similarly, the Supreme Court did acknowledge that the "right to remain anonymous may be abused," but in the *very next sentence* wrote: "But 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." 514 U.S. at 357, 115 S. Ct. at 1524. Once again, the Court was explaining

that it would not permit States to breach anonymity for some true speech in the name of aiding the enforcement of a State fraud or libel law. On the contrary, the Court recognized that a free society prefers that some false speech go unpunished in order that no truthful speech will be deterred. That indeed is the very essence of the Constitutionally required "breathing space."

At best, the *McIntyre* Court suggested that States might impose a law that threatened to unmask some truthful speech, if the State acted in pursuit of an "overriding interest", 514 U.S. at 347, 115 S. Ct. at 1519, and if the State rule providing for the unmasking bore a "necessary relationship to the danger sought to be prevented." 514 U.S. at 357, 115 S. Ct. at 1524. As shown below, our current law does not satisfy this standard. At a minimum, the economic loss rule that Doe proposes would be necessary to bring cases like this one into conformity with *McIntyre*. That is, only a particular, identifiable subset of government official libel cases can *even arguably* meet the Constitutional standard – one in which the harm caused by the publication was substantial, objective and real.

The trial court also overstated the degree to which State libel law constrained it from applying First Amendment analysis:

> I am writing on a slate that provides First Amendment protections to persons criticizing public officials only where the protections do not interfere with the underlying purposes of state tort law.

Appendix "2", p. 10.

This statement greatly misunderstands four decades of developments begun by *New York Times v. Sullivan* (reversing a plaintiff's verdict and requiring public officials to prove "actual malice); extended by *Gertz v. Robert Welch, Inc.* (requiring non-

government public figures to prove "actual malice" as well as *any* plaintiff who seeks damages without proof thereof, and leaving to the States to establish some "fault" basis for private plaintiff defamation cases); and emphasized again by *Philadelphia Newspapers, Inc. v. Hepps* (reversing longstanding Pennsylvania law and requiring all libel plaintiffs to bear the burden of proving the falsity of speech of public concern). Indeed, the *Sullivan* "era" in libel law literally began with the following words from the opening paragraph of the *Sullivan* opinion:

> We are required in this case to determine for the first time the extent to which ***the constitutional protections for speech and press limit a State's power to award damages in a libel action*** brought by a public official against critics of his official conduct.

376 U.S. at 256, 84 S. Ct. at 713 (emphasis added). Later, many of the ensuing First Amendment limitations were summarized by the Supreme Court in *Philadelphia Newspapers, Inc. v. Hepps*, in language that makes clear that it is the First Amendment that restricts State libel law, and not vice-versa:

> We recognize that requiring the plaintiff to show falsity will insulate from liability some speech that is false, but unprovably so. Nonetheless, the Court's previous decisions on the restrictions that the First Amendment places upon the common law of defamation firmly support our conclusion here with respect to the allocation of the burden of proof. In attempting to resolve related issues in the defamation context, the Court has affirmed that '[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters.' *Gertz*, 418 U.S., at 341, 94 S. Ct., at 3007. Here, the speech concerns the legitimacy of the political process, and therefore clearly 'matters.' *See Dun & Bradstreet*, 472 U.S., at 758-759, 105 S. Ct., at 2945. To provide 'breathing space,' *New York Times, supra,* 376 U.S., at 272, 84 S. Ct., at 721, for true speech on matters of public concern, the Court has been willing to insulate even *demonstrably* false speech from liability, and has imposed additional requirements of fault upon the plaintiff in a suit for defamation …."

Hepps, 475 U.S. at 778, 106 S. Ct. at 1564-65 (emphasis in original).

Significantly, the new doctrines announced in *New York Times v. Sullivan* and its progeny grew largely out of two concerns that present themselves anew in this case. First, the concern – particularly in the *Sullivan* case itself – that a relatively new forum providing access to political discussion and debate (in that case, the development of a national media) was inadequately protected and required a fresh balancing between local libel laws and our national commitment to free speech. In that particular instance, this new balancing required that potentially false criticism of government officials be protected unless it could be shown that it was knowingly or recklessly false.

In the present case, involving the emerging Internet, with millions of "average" citizens speaking (often anonymously) on a limitless range of topics, a proper balancing of First Amendment interests would give appropriate recognition to the indispensable but vulnerable right of anonymity in the face of lawsuits by powerful plaintiffs. A new rule should also address the sheer volume of Internet communications that are potentially the subject of libel suits, and the greatly reduced (sometimes even trivial) impact of much of that anonymous Internet speech. The economic loss rule does all of this.

The second concern motivating the *New York Times v. Sullivan* line of cases, and presented again in this case, was the unique ability of plaintiffs in defamation cases to recover judgments that were out of all proportion to any objectively proven harm. Indeed, one contribution of *Gertz v. Robert Welch, Inc.* to the development of First Amendment law is to limit the damages recoverable in the absence of actual malice.

In *Sullivan*, the Court noted that the judgment entered against the *Times* in the lower court was one thousand times greater than the maximum fine provided by the

Alabama criminal [libel] statute, "without the need for any proof of actual pecuniary loss," and noted, "Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive." 376 U.S. at 278, 84 S. Ct. at 724-25.

The Court further noted in *Gertz*:

> The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, the states have no substantial interest in securing for plaintiffs … gratuitous awards of money damages far in excess of any actual injury.

418 U.S. at 349, 94 S. Ct. at 3011-3012.

Clearly, *Sullivan* and *Gertz* and the other landmark decisions in this area took cases away from the law of libel that would otherwise have produced (and indeed which had produced in the courts below) substantial plaintiff's verdicts. The Supreme Court was aware of and intended this result. Each rule was crafted to give political speech the "breathing space" it needs to survive, recognizing that if speakers could only avoid an adverse judgment by ultimately convincing a jury that they spoke the truth, free and truthful speech would be deterred. Again, the economic loss rule in the context of anonymous Internet criticism of government is a modest and natural extension of this logic.

In summary, it simply cannot be said that the First Amendment only protects speech when it can do so consistent with state libel law. Quite the opposite is true.

Having reversed the important relationship between the Constitution and the common law, and having misinterpreted the holding in *McIntyre*, the result in the court below gave "breathing space," not to free speech, but to libel law, permitting it to invade the anonymity of some truthful critics of government, lest a single defamer should go unpunished. This, under the Supreme Court's libel and anonymity cases, is error of Constitutional magnitude.

V. Libel law as applied to the intrusion on anonymity in this case cannot satisfy exacting scrutiny.

First Amendment jurisprudence recognizes that there is a material difference between the interest of a private individual, on the one hand, and that of an elected official or public figure on the other, in being free from public embarrassment.

> [W]e have no difficulty in distinguishing among defamation plaintiffs. … Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and *the state interest in protecting them is correspondingly greater*.

Gertz v. Robert Welch, Inc., 418 U.S. at 344, 94 S. Ct. at 3009 (emphasis added). More importantly, the Court added:

> An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. … Even if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No

> such assumption is justified with respect to a private individual. … He has relinquished no part of his interest in the protection of his own good name, and consequently *has a more compelling call on the courts for redress* of injury inflicted by defamatory falsehood. Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.

418 U.S. at 344-45, 94 S. Ct. at 3009-3010 (emphasis added).

The state's interest in libel cases of this kind is further, and substantially, weakened by the absence of proven economic harm. As noted at greater length above, "the states have no substantial interest in securing for plaintiffs … gratuitous awards of money damages far in excess of any actual injury." *Gertz*, 418 U.S. at 3490, 94 S. Ct. at 3012.

On the other side of the scale, the features of anonymous speech on the Internet have an enhanced claim to First Amendment protection. The Internet gives common, modern Americans an unprecedented ability to speak, and to inject that speech into an active "town square" discussion. Today, this "vast democratic forum" is available to millions of Americans, and indeed may be the only vehicle for public debate available to those who, for the very same reason, are the most vulnerable to the deterrent effect of breaching anonymity – those who lack substantial assets, power or status. If state libel laws are applied indiscriminately to chill truthful anonymous speech in that forum, it is precisely those of little wealth and power whose First Amendment freedom will suffer most.

Anonymous speech on the Internet, because of its inherently reduced persuasive force and the inherent opportunity of anyone criticized to respond immediately in the same medium, presents much less threat to reputation than traditional communications media. Yet because of the sheer volume of Internet communications, and the ability to

trace them, the courts are beginning to experience a flood of libel cases against Internet "John Does". In many of those cases, the actions are dismissed as soon as the defendant's identity is uncovered, suggesting that court facilities and processes are being abused for other, private purposes.

VI. Exacting scrutiny requires, at a minimum, that the First Amendment right of anonymity be lost only in cases where the public plaintiff proves economic harm.

Supreme Court precedent does not call for absolute immunity for anonymous political speech on the Internet, no matter how damaging that speech proves. However, libel actions brought by elected officials or public figures against anonymous Internet critics, where there is no economic harm to the plaintiff, present the weakest claim for imposing burdens on speech. They cannot and should not justify breaching the defendant's right of anonymous speech.

In such cases, the requirement that the plaintiff prove the existence of economic harm at a preliminary stage, before the defendant's identity is forced to be disclosed (a disclosure that may be the ultimate loss for the defendant and indeed the ultimate prize sought by the plaintiff) will distinguish between those cases where there is *some* measurable social interest in regulating the speech at issue, and those cases where the State's legitimate interest is so attenuated as to fail to satisfy "exacting scrutiny" analysis. At the same time, the requirement of proven economic harm will serve the beneficial purpose of assuring that court resources will be available for serious, but not for trivial or abusive, cases. This is the same "gatekeeping" purpose that the economic harm requirement historically served in cases of slander other than those classified as

slander *per se*. *E.g.,* Restatement of Torts 2d §575. There as here, a requirement of economic harm served to identify the serious cases worthy of legal attention in an otherwise potentially vast world of speech (oral communications) with reduced power to cause real injury, not unlike the modern Internet.

> If the case were classified as one of slander, on the other hand, judges usually started with a belief that the casual gossip usually involved would not be likely to cause harm of any permanent nature, if any at all, and for this reason, together with some reasons of historical importance, they refused to allow the plaintiff any recovery for mere slander unless he showed pecuniary loss, or some exceptional case.

Dobbs, *Remedies*, 511-512 (1973) (footnotes omitted). The economic harm rule has thus already withstood the test of time as a workable threshold requirement based on a well-recognized definition that is rooted in ancient law.

It is not enough, however, to require a public libel plaintiff merely to *allege* economic harm. That would return this case to its present posture, where a plaintiff's mere allegation is sufficient to end the defendant's First Amendment right of anonymity. The requirement must be that public plaintiffs prove economic harm by competent evidence before forcing disclosure of the identity of an anonymous Internet libel defendant.

While the economic harm requirement in cases like the present one will effect a *change* in libel law, it will not be, as the trial court was concerned, inconsistent with the permissible *underlying purpose* of the law: to protect individuals who are harmed by defamatory utterances. It will continue to afford access to the courts by government officials where real economic harm is present. Those cases will proceed consistent with the now-familiar burdens of proof imposed by *New York Times v. Sullivan* and its progeny. But in the cases viewed by the First Amendment as having substantially

reduced significance – cases weakened once by plaintiff's status as a public official or figure, twice by the substitution of plaintiff's mere assertion of falsity in place of a finding of proven falsity, and weakened yet a third time by the absence of any economic harm – the balance will not be tipped against the right of anonymity.

The home Web Page is reminiscent in many ways of the small printing press of the 18th Century that gave anyone with access the ability to enter any debate and be heard. This is a precious power in the expensive and crowded modern world, and one not lightly to be ravaged to assuage public figures who find open debate merely discomforting but not objectively damaging.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court rule that the First Amendment requires a showing of economic harm before public figures can use State libel law to force the revelation of the identity of anonymous Internet critics. Because Plaintiff/Appellee in this case has no claims for economic injury, Appellant requests that the trial court be reversed and that judgment be entered dismissing this action.

Respectfully submitted,

By:_____
Ronald D. Barber, Esquire
Pa. I.D. No. 52734

Strassburger McKenna Gutnick
& Potter, P.C.
322 Boulevard of the Allies
Suite 700
Pittsburgh, PA 15222
(412) 281-5423
(412) 281-8264 (Fax)

Witold J. Walczak, Esquire
Pa. I.D. No. 62976
American Civil Liberties Fdn.
Of Pennsylvania
313 Atwood Street
Pittsburgh, PA 15213

Of Counsel:
Ann Beeson
Christopher Hanson
American Civil Liberties Union Fdn.
125 Broad Street
New York, NY 10004

Attorneys for Appellants.