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15 UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

16 RON PAUL 2012 PRESIDENTIAL CAMPAIGN)
COMMITTEE, INC., a Delaware Corporation,)

17 Plaintiff,)
18)
19)

20 v.)

21 DOES 1-10, INCLUSIVE)

22 Defendants.)
23)

No. CV-12-0240-MEJ

**MOTION OF PUBLIC CITIZEN,
AMERICAN CIVIL LIBERTIES
UNION, ELECTRONIC
FRONTIER FOUNDATION AND
DIGITAL MEDIA LAW PROJECT
FOR LEAVE TO FILE AS AMICI
CURIAE ADDRESSING THE
PROPER STANDARD FOR EARLY
DISCOVERY TO IDENTIFY
ANONYMOUS POLITICAL
SPEAKERS**

1 For the reasons set forth in the attached memorandum, Public Citizen, American Civil
2 Liberties Union, Digital Media Law Project, and Electronic Frontier Foundation move the Court to
3 grant them leave to file the accompanying memorandum as amici curiae seeking clarification of the
4 Court's January 25, 2011, order setting the standard that the plaintiff should meet in any future motion
5 for leave to take early discovery from Google and Twitter seeking information identifying the Doe
6 defendants in this case. Amici request that the Court apply the standard set forth in the numerous
7 other rulings from district judges in this District, as well as state appellate and federal district courts
8 throughout the country that have addressed the proper standard to be applied to political speech and
9 citizen criticism like the speech at issue in this case.

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RON PAUL 2012 PRESIDENTIAL CAMPAIGN)
COMMITTEE, INC., a Delaware Corporation,)

Plaintiff,)

v.)

DOES 1-10, INCLUSIVE)

Defendants.)

No. CV-12-0240-MEJ

**MEMORANDUM OF
PUBLIC CITIZEN, AMERICAN
CIVIL LIBERTIES UNION,
ELECTRONIC FRONTIER
FOUNDATION AND DIGITAL
MEDIA LAW PROJECT IN SUP-
PORT OF MOTION FOR LEAVE
TO FILE AS AMICI CURIAE
ADDRESSING THE PROPER
STANDARD FOR EARLY
DISCOVERY TO IDENTIFY
ANONYMOUS
POLITICAL SPEAKERS**

1 Public Citizen, American Civil Liberties Union, Digital Media Law Project, and Electronic
2 Frontier Foundation have moved the Court to grant them leave to file the accompanying memorandum
3 as amici curiae addressing the proper standard that the plaintiff should meet in any future motion for
4 leave to take early discovery from Google and Twitter seeking information identifying one of the Doe
5 defendants in this case, for the following reasons:

6 1. This is an action by the presidential campaign committee for Congressman Ron Paul,
7 alleging that anonymous Internet users who created and posted to YouTube a video criticizing the
8 candidacy of former Utah Governor Jon Huntsman because of his fluency in Chinese and his ties to
9 China thereby infringed Mr. Paul's common law trademark and defamed the campaign committee.
10 The basis for these claims is that the video closes with a plea to vote for Mr. Paul for President and
11 that the pseudonym used for posting the YouTube video is NH4LibertyPaul; plaintiff contends that
12 these phrases improperly imply that the campaign committee itself is responsible for the video, and
13 that this implication is false. Plaintiff then filed a motion for leave to take immediate discovery to
14 identify the defendants, relying on authority that allows pro se prisoners to learn the names of police
15 officers or prison officials who participated in their mistreatment, and on authority enables the owners
16 of copyrights in sound recordings to identify individuals who have used file-sharing software to
17 download their recordings. However, well-established precedent in this District, as well as in state
18 and federal courts throughout the United States requires courts to balance a plaintiff's interest in
19 proceeding with a valid lawsuit against the First Amendment right of anonymous speakers to retain
20 their anonymity by requiring an evidentiary showing that there is a realistic chance that the lawsuit will
21 be successful.

22 2. On Wednesday, the Court denied the motion for early discovery without prejudice. But
23 amici are worried that the Court's ruling sets a standard for plaintiff to meet that is much lower than

1 other judges in this district have required in cases involving speech critical of the plaintiff that is
2 protected by the First Amendment. These cases were omitted from plaintiff's ex parte motion for
3 leave to take early discovery—in the view of amici, improperly so—but the very existence of the
4 Court's ruling will embolden other lawyers representing plaintiffs to file ex parte motions that cite that
5 decision and ignore previous cases from this district that demand much more of plaintiffs. The
6 Court's decision has already been cited by a law blogger as setting the standard for discovery in
7 defamation cases. [http://blog.internetcases.com/2012/01/26/ron-paul-not-allowed-to-find-out-who](http://blog.internetcases.com/2012/01/26/ron-paul-not-allowed-to-find-out-who-posted-mean-video-about-jon-huntsman-on-youtube/)
8 [-posted-mean-video-about-jon-huntsman-on-youtube/](http://blog.internetcases.com/2012/01/26/ron-paul-not-allowed-to-find-out-who-posted-mean-video-about-jon-huntsman-on-youtube/). And this Court's standard for identifying
9 anonymous speakers is particularly important because so many Internet Service Providers who receive
10 such subpoenas, including Google, Twitter, and Yahoo!, are located within this district. Moreover,
11 if the Court decides to adopt the standard, drawn from previous decisions in this district, that amici
12 propose, it would be more fair for plaintiff to know that in advance so that it can frame any future
13 motion for early discovery in this case accordingly.

14 3. Amici, four non-profit organizations that have played a leading role in developing the
15 national consensus standard regarding the test for identifying anonymous Internet speakers, explain
16 in this brief why the higher standard should apply in this case.

17 a. Public Citizen is a consumer advocacy organization based in Washington, D.C. It has more
18 than 225,000 members and supporters, nearly 42,000 of them in California. Since its founding in
19 1971, Public Citizen has encouraged public participation in civic affairs and has brought and defended
20 numerous cases involving the First Amendment rights of citizens who participate in civic affairs and
21 public debates. *See generally* <http://www.citizen.org/litigation/briefs/internet.htm>. In particular, over
22 the past eleven years, Public Citizen has represented Doe defendants or Internet forum hosts or been
23 the lead counsel on briefs (and often argument) as amicus curiae in cases in which subpoenas have

1 sought to identify hundreds of authors of anonymous Internet messages. The courts in these and other
2 cases have adopted (sometimes with slight modifications) a standard for deciding such cases that was
3 originally developed and suggested by Public Citizen, and adopted by the New Jersey Appellate
4 Division in *Dendrite Int'' v. Doe*, 775 A.2d 756 (N.J. App. 2001).

5 b. The Electronic Frontier Foundation ("EFF") is a non-profit, member-supported civil
6 liberties organization working to protect rights in the digital world. EFF actively encourages and
7 challenges industry, government and the courts to support free expression, privacy, and openness in
8 the information society. EFF has repeatedly served as both amicus and counsel in cases involving
9 online anonymity rights, including in this district in *USA Technologies v. Doe*, 713 F. Supp.2d 901
10 (N.D. Cal. 2010). Founded in 1990, EFF is based in San Francisco, California. EFF has members all
11 over the United States and maintains one of the most linked-to websites (<http://www.eff.org>) in the
12 world. Currently, EFF is supported by over 3,300 paying members in California. In addition, more
13 than 8,400 California residents subscribe to EFF's weekly e-mail newsletter, EFFector.

14 c. The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan
15 organization with over 500,000 members, dedicated to the principles of liberty and equality embodied
16 in the Constitution and our nation's civil rights laws. Founded in 1920, the ACLU has vigorously
17 defended free speech for over ninety years in federal courts to protect the constitutional guarantees
18 afforded free speech and free expression by the First Amendment. The ACLU has also been at the
19 forefront in supporting efforts to ensure that the Internet remains a free and open forum for the
20 exchange of information and ideas. ACLU attorneys have represented parties or amici in numerous
21 cases involving free speech on the Internet, including *ACLU v. Reno*, 521 U.S. 844 (1997) and
22 *Ashcroft v. ACLU*, 535 U.S. 564 (2002).

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1 d. Founded in 2007, the mission of the Digital Media Law Project (“DMLP”) is to serve as
2 a catalyst for creative thinking about the intersection of law and journalism on the Internet, and to
3 provide those engaged in digital journalism with the assistance, training, research, and other resources
4 necessary to promote innovation and entrepreneurship. Through a variety of initiatives, and with the
5 active engagement of lawyers and scholars, the DMLP works to build a community of lawyers,
6 academics, and others who are interested in facilitating citizen participation in online media and
7 protecting the legal rights of those engaged in speech on the Internet. The DMLP is affiliated with
8 Harvard University’s Berkman Center for Internet & Society, a research center founded to explore
9 cyberspace, share in its study, and help pioneer its development. The DMLP has appeared as an
10 amicus in numerous cases involving freedom of speech online (among them cases involving
11 anonymous speech), including: *Bank Julius Baer & Co. Ltd v. Wikileaks*, 535 F.Supp.2d 980 (N.D.
12 Cal. 2008); *Maxon v. Ottawa Publ’g Co.*, 929 N.E.2d 666 (Ill. App. Ct. 2010); *Barnes v. Yahoo! Inc.*,
13 570 F.3d 1096 (9th Cir. 2009); *The Mortgage Specialists v. Implode-Explode Heavy Industries*, 999
14 A.2d 184 (N.H. 2010); *Barclays Capital v. Theflyonthewall.com, Inc.*, 650 F.3d 876 (2d Cir. 2011);
15 and *Jenzabar, Inc. v. Long Bow Group*, No. 2011-P-1533 (Mass. App. Ct. January 18, 2012).

16 4. Since the turn of the century, amici have sought to encourage the development of First
17 Amendment precedent requiring courts to cast a skeptical eye on subpoenas that seek to compel the
18 identification of anonymous Internet speakers, and they have been involved in many of the major cases
19 in which the standard for deciding whether to allow or to enforce such subpoenas has been established,
20 beginning with cases such as *Melvin v. Doe*, 836 A.2d 42 (Pa. 2003); *Dendrite v. Doe*, 775 A.2d 756
21 (N.J. App. 2001); *Doe v. 2theMart.com*, 140 F. Supp.2d 1088, 1093 (W.D. Wash. 2001), and
22 continuing into the present. E.g., *Koch Industries v. Doe*, 2011 WL 1775765 (D. Utah May 9, 2011);
23 *USA Technologies v. Doe*, 713 F. Supp.2d 901 (N.D. Cal. 2010). In some of these cases, amici have

1 represented Does and Internet Service Providers in responding to subpoenas; in others, amici have
 2 appeared as amicus curiae, often signing the same brief. In addition, in *Mick Haig Productions v.*
 3 *Does 1-670*, 2011 WL 5104095 (N.D. Tex. Sept. 9, 2011), attorneys for Public Citizen and EFF were
 4 appointed as guardians ad litem for the anonymous Internet users to respond to a motion for leave to
 5 take discovery to identify the defendants who were sued for allegedly downloading a pornographic
 6 film entitled “Der Gute Onkel.” Most recently, Public Citizen, EFF and the ACLU filed an amicus
 7 brief supporting application of the consensus standard in *Art of Living v. Does 1-10*, 2011 WL
 8 5444622 (N.D. Cal. Nov. 9, 2011).

9 5. This experience makes amici uniquely well equipped to explain to the Court what standard
 10 should be applied to any renewed motion for leave to take early discovery that the Paul campaign
 11 committees may file, and why that standard cannot be met in these circumstances. In addition,
 12 plaintiff’s motion for leave to take early discovery withheld significant and indeed controlling
 13 authority from the Court, which is particularly troublesome because the motion was filed ex parte,
 14 hence depriving the Court of the benefits of the adversary system to bring that authority to its
 15 attention. Regrettably, the filing of similar motions for early discovery has become commonplace in
 16 this district and elsewhere. Amici urge the Court to remind counsel of their obligation to identify
 17 adverse authority in ex parte motion papers.

18 6. Counsel for plaintiff, James Davis, Esquire, stated that plaintiff does not consent to this
 19 motion.

20 **CONCLUSION**

21 Amici’s motion for leave to file the attached brief should be granted.

22 /s/ Scott Michelman
 23 Paul Alan Levy (DC Bar No. 946400)

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January 27, 2012

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CERTIFICATE OF SERVICE

I hereby certify that, on this 27th day of January, 2012, I filed this Motion for Leave to File as Amici Curiae, and the accompanying amicus brief, through the Court’s ECF system, which will cause copies to be served electronically on counsel for all parties.

Respectfully submitted,

/s/ Scott Michelman
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