IN THE
Supreme Court of Virginia

RECORD NO. _____
Court of Appeals Record No. 0116-13-4

YELP INC.,
Non-party respondent-appellant,

v.

HADEED CARPET CLEANING,
Plaintiff-Appellee.

PETITION FOR APPEAL

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ASSIGNMENTS OF ERROR

1. The Court of Appeals erred when, in disagreement with appellate courts in ten other states, it held that the First Amendment allows a court to enforce subpoenas to Internet providers for information identifying users who exercised their First Amendment right to speak anonymously, without any evidence that the users speech was tortious or otherwise wrongful. Yelp's Appellate Opening Brief ("AOB") 17-13, 28-31

2. The Court of Appeals erred by deciding that it could not reach the First Amendment issue without first deciding that the statutory procedure for litigating subpoenas to identify anonymous speakers, Virginia Code § 8.01-407.1, is unconstitutional. Yelp's Appellate Reply Brief ("ARB") 2-3 and oral argument.

3. The Court of Appeals erred by concluding that § 8.01-407.1 reflects a legislative policy decision to reject the approach of appellate courts in other states that require evidence of wrongdoing before the First Amendment right to speak anonymously is taken away. Raised for the first time at oral argument.

4. The Court of Appeals erred by stating that in need not find a compelling interest because any criticism of a commercial enterprise is commercial speech, a ruling that is without legal basis and was not raised by briefs of either party below, whose briefs cited only cases involving noncommercial speech. AOB 10, 13, 16; Hadeed Appellate Brief 14, 16-19.

5. The Court of Appeals erred by ruling that § 8.01-407.1 and the First Amendment authorized enforcement of Hadeed Carpet Cleaning's subpoena to identify seven anonymous speakers without any evidence that the gist of their criticisms of Hadeed's business practices was untrue. AOB 26-31.

6. The Court of Appeals erred by failing to consider the devastating consequences to anonymous online speech that would result from allowing disclosure of speakers' identities without evidence of tortious conduct. AOB 16-17.

7. The Court of Appeals erred by failing to consider whether there was a

compelling governmental interest in infringing on the First Amendment rights of anonymous online speakers. AOB 10.

8. The Court of Appeals erred by applying an abuse of discretion standard in reviewing the Circuit Court's decision to enforce the subpoena, because decisions about the application of the First Amendment are subject to independent review on the record as a whole. AOB 11-12.

9. The Court of Appeals erred by holding, again contrary to rulings in the appellate courts of several sister states, that a Virginia trial court may assert subpoena jurisdiction over a non-party California company, to produce documents located in California, just because the company has a registered agent in Virginia. AOB 33-36.

STATEMENT OF THE CASE

Hadeed Carpet Cleaning subpoenaed Yelp Inc., to identify seven Yelp users who posted unfavorable reviews of the services Hadeed had provided to them; the reviewers had claimed that Hadeed advertises low prices but then charges higher prices when the work is actually done. Yelp objected, in part because Hadeed presented no evidence that the reviews contained false statements and therefore no compelling interest supported a court order divesting the reviewers of their First Amendment right to speak anonymously, and in part because, as a non-party California company, Yelp could only be required to respond to a California subpoena. Hadeed successfully moved to overrule the objections in the Circuit Court for Alexandria. To obtain the right of appeal, Yelp declined to obey the order and took a contempt citation.

On appeal from the contempt order, the Court of Appeals affirmed, 752 S.E.2d 554, reasoning that it could not find the subpoena in violation of the First Amendment without holding a Virginia statute unconstitutional, that the statute represented a conscious legislative decision not to require evidence before subpoenas to identify anonymous speakers could be enforced, and that, applying the presumption against finding a statute unconstitutional, the Court could not find the statute to be, without any doubt, in violation of the First Amendment. Thus, the Court ruled that enforcement of the subpoena without evidence of falsity did not violate the statute. The majority held that Hadeed's vague expression of belief that the reviewers were not customers, based on the representation that it had reviewed a customer database to see whether the anonymous reviewers were customers, was sufficient reason to enforce the subpoena. In dissent, Judge Haley said that a conclusory claim to have conducted an investigation of whether the reviewers were customers, especially where Hadeed never asserted that the underlying charges of bait and switch tactics were false, was not enough reason to enforce the subpoena considering the First Amendment rights at stake.

The main question on this appeal—an issue of first impression in this Court—is whether the lower courts applied the proper legal standard in

overriding the anonymous speakers' First Amendment rights. Courts in ten other states and throughout the federal system have recognized that, given the valuable role played by the First Amendment right to speak anonymously in encouraging ordinary people to express themselves fully, it is necessary to balance that right against a plaintiff's right to seek redress for wrongful speech by adopting a standard requiring a plaintiff to do more than articulate a good faith belief in its own claim. Before stripping the defendant of a First Amendment right, these courts take an early look at the merits of the plaintiff's claim to determine whether a valid claim has been alleged and whether there is a prima facie evidentiary basis for that claim. In this appeal, Yelp urges Virginia to adopt the same approach, and to remand this case to give Hadeed an opportunity to pursue its subpoena in California, and to meet the proper constitutional standard.

QUESTIONS PRESENTED

1. Does the First Amendment require a plaintiff seeking to use state power to compel identification of anonymous speakers whom it charges with tortious speech to satisfy a balancing test that requires the presentation of evidence of wrongdoing?
2. Does Virginia Code § 8.01-407.1, construed in light of the First Amendment, incorporate the First Amendment's requirement of evidence before subpoenas to identify anonymous speakers may be enforced?
3. Did Hadeed make a sufficient showing to warrant depriving the Doe defendants of their First Amendment right to speak anonymously?
4. Should the Court of Appeals have conducted an independent review on the whole record instead of applying an abuse of discretion standard?

5. Was non-party Yelp, a California company, amenable to subpoena jurisdiction because it had a registered agent in Virginia?

FACTS AND PROCEEDINGS BELOW

A. Background

Protection for the right to engage in anonymous communication is fundamental to a free society. As electronic communications have become essential tools for speech, the Internet in all its forms—web pages, email, chat rooms, and the like—has become a democratic institution in the fullest sense. It is the modern equivalent of Speakers' Corner in England's Hyde Park, where ordinary people may voice their opinions, however silly, profane, or brilliant, 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.
>
> Full First Amendment protection applies to speech on the Internet.

Knowing that people have personal interests in news developments, and that people love to share their views with anyone who will listen, many

companies have organized outlets for the expression of opinions. A leading example of such web sites is Yelp, which presents organized forums for consumers to share their experiences with local merchants.

The individuals who post messages often do so under pseudonyms—similar to the old system of truck drivers using "handles" when they speak on their CB's. Nothing prevents an individual from using his real name, but, as inspection of the forum at issue here will reveal, many people choose nicknames that protect the writer's identity from those who disagree with him or her, and hence encourage the uninhibited exchange of ideas and opinions.

Many Internet forums have a significant feature—and Yelp is typical in that respect—that makes them very different from almost any other form of published expression. Subject to requirements of registration and moderation, any member of the public can use the forum to express his point of view; a person who disagrees with something that is said on a message board for any reason—including the belief that a statement contains false or misleading information—can respond to that statement immediately at no cost, and that response can appear adjacent to the offending message. Most online forums are thus unlike a newspaper, which cannot be required to print responses to its criticisms. *Miami Herald*

Pub. Co. v. Tornillo, 418 U.S. 241 (1974). By contrast, on most Internet forums, companies and individuals can reply immediately to criticisms, giving facts or opinions to vindicate their positions, and thus, possibly, persuading the audience that they are right and their critics are wrong. Appellant Yelp enables any merchant whose goods and services are subject to consumer reviews to place its reply directly under the review to which it is replying; Hadeed has repeatedly taken advantage of this privilege. And, because many people regularly revisit message boards, a response is likely to be seen by much the same audience as those who saw the original criticism; hence the response reaches many, if not all, of the original readers. In this way, the Internet provides the ideal proving ground for the proposition that the marketplace of ideas, rather than the courtroom, provides the best forum for the resolution of disagreements about the truth of disputed propositions of fact and opinion.

B. Facts of This Case

Hadeed is a Virginia company that takes consumers' carpets to its premises for cleaning. As of October 19, 2012, Yelp's public web site displayed seventy-five reviews about Hadeed and eight more reviews about a related company, Hadeed Oriental Rug Cleaning. Court of Appeals Appendix ("App.") 79a ¶ 9, 82-118. These reviews had been

posted by various users on the Internet platform that Yelp provides to enable consumers to describe their experiences with local businesses. Yelp's Terms of Service and Content Guidelines require reviewers to have actually had a customer experience with the business in question and to base their posts on their own personal experiences. App. 79a ¶ 10. Posts that Yelp deems in violation of these requirements are subject to removal. In addition, Yelp uses a proprietary algorithm to screen potentially less reliable reviews; such reviews are moved to a separate page, which a visitor to Yelp's site can view by clicking on a link at the bottom of a business listing with such screened reviews; ratings associated with those reviews are not factored into the business's overall rating on Yelp. App. 79b ¶ 12. Taking the screened and unscreened reviews together, forty-eight reviews gave Hadeed the lowest possible rating, one star, but twenty-eight others gave it the highest possible rating of five stars. Two, three and two posters gave ratings of two, three, and four stars, respectively. App. 79a ¶ 11, 82-118.

Yelp users must register to be able to post reviews; in the registration process, users must provide a valid email address. App. 78-79 ¶ 3. However, users are free to choose any screen name they like, and may also designate a particular zip code of their choosing as their "location."

There is no requirement that the user's actual name or actual place of residence be identified (although Yelp encourages users to provide real names). *Id.* Moreover, users who change locations are not required to change their location description when they move. *Id.* Yelp also typically records the Internet Protocol ("IP") address from which each posting is made. App. 79 ¶ 4. This information is typically stored in Yelp's administrative database and is accessible to Yelp's custodian of records in San Francisco. *Id.*

Hadeed sued the authors of seven specific reviews. It alleges that it had tried to match the reviews with its customer database but "had no record that [these] negative reviewers were ever actually Hadeed Carpet customers," App. 3 ¶ 13, and consequently claims to harbor the "belie[f] . . . that the reviews . . . were made by Defendants falsely representing themselves as customers of Hadeed." During the course of the ensuing proceedings, Hadeed offered no evidence to support its belief, no description of its investigation (such as the format of the database or the methodology employed), and no explanation of how its investigation led it to that belief. In oral argument in the trial and appellate courts, Hadeed freely acknowledged how sketchy its basis for the subpoena was—to the trial court, Hadeed said, "I don't know whether that person is a customer or

not, and we suspect not," App. 164, and in oral argument on appeal, it "candidly admitted that it cannot say the John Doe defendants are not customers until it obtains their identities." 752 S.E.2d at 711.

Hadeed alleges that the posts were false and defamatory, *id.* ¶ 15, but **only** because of its suspicion that the authors were not customers. Hadeed does not allege that the substance of the accusations in the postings was false. For example, Hadeed does not deny that it sometimes charges twice the advertised price, that it sometimes charges for work that was never performed, that unauthorized work is sometimes performed, or that rugs are sometimes returned to the customer containing stains that were not successfully removed. Rather, the only falsity alleged in the complaint is the assertion that, contrary to the assertions in each of the contested reviews, in fact the posters were not actual customers of Hadeed. App. 4 ¶ 20, 5 ¶ 22.

Although there are common threads among the substantive complaints in the challenged posts, such as customers being charged twice the advertised price, many other Yelp reviews share the same themes. *E.g.*, App. 84, 85, 87, 88, 89, 90, 92. The fact that Hadeed has not sued the authors of those comments implies that Hadeed recognizes that its actual customers have such problems. Indeed, taking advantage of

the fact that merchants can place a reply to each review directly under the review itself, Hadeed responded to several customer reviews that raise such issues by promising that the feedback would help the company to improve. *E.g.*, App. 84, 85. See also App. 101 (Hadeed apologized to "MP," one of the reviewers it is now suing, recognizing that she was a customer).

C. Proceedings to Date.

On July 2, 2012, Hadeed filed a complaint in the Circuit Court for the City of Alexandria, alleging defamation and conspiracy to defame against two John Does and a Doe corporation. App. 1-6. Hadeed subpoenaed Yelp to produce documents identifying the authors of seven anonymous reviews, serving Yelp's registered agent in Virginia. Pursuant to section 8.01-407.1(A)(4), Yelp filed detailed written objections to the subpoena in the Circuit Court, contending that the subpoena contravened both Virginia law and the First Amendment rights of Yelp's users, contending as well that a Virginia court lacked jurisdiction to subpoena documents from a California company just because that company had a registered agent in Virginia. App. 7-9. Yelp contended that the Virginia courts should adopt the First Amendment analysis adopted by state appellate courts throughout the country, following the lead of *Dendrite v. Doe*, 775 A.2d 756 (N.J.

Super. App. Div. 2001), and *Doe v. Cahill*, 884 A.2d 451 (Del. 2005), that requires a plaintiff seeking to identify anonymous Internet speakers to make both a legal and an evidentiary showing that the suit has merit before a court may deny users the First Amendment right to speak anonymously.

Hadeed moved to overrule those objections, and the Circuit Court enforced the subpoena. App.181-183. Yelp disobeyed the subpoena so that it could appeal from the ensuing contempt judgment. App. 184-186. On appeal, Yelp argued that enforcement of the subpoena violated both the First Amendment and § 8.01-407.1(A)(4) which, Yelp argued, was properly construed to incorporate the First Amendment protections that other state appellate courts had found applicable. Yelp also argued that Virginia should construe its rules concerning subpoenas to non-party foreign corporations consistent with the longstanding approach in other states, which hold that documents can be obtained only from domestic companies, while mutual interstate discovery statutes are employed to obtain documents from out-of-state companies by invoking the subpoena power of the courts in those companies' own states.

The Court of Appeals affirmed. 752 S.E.2d 554. It declined to adopt the *Dendrite* approach because it believed that the Virginia Legislature had considered but rejected that approach in adopting § 8.01-407.1, and that it

could not follow *Dendrite* as a matter of First Amendment law without holding the statute unconstitutional which, it said, it could not do because "any reasonable doubts as to the constitutionality of a statute must be resolved in favor of its constitutionality." It also held that Virginia's rules of procedure authorize courts to exercise subpoena jurisdiction over non-party corporations that have registered agents in Virginia.

REASONS FOR HEARING THIS APPEAL

I. THIS CASE PRESENTS AN IMPORTANT ISSUE OF CONSTITUTIONAL LAW THAT WILL ARISE REPEATEDLY, AND IT IS ESSENTIAL THAT THIS COURT CLARIFY THE FIRST AMENDMENT STANDARD THAT APPLIES WHEN PLAINTIFFS SEEK TO IDENTIFY THEIR ANONYMOUS CRITICS.

A. Although the issue of the showing that the First Amendment requires before an anonymous Internet speaker may be identified pursuant to subpoena is one of first impression in Virginia, appellate courts in about a dozen other states have confronted the same question, and their holdings are squarely at odds with the holding of the court below. These courts have each recognized that the proper standard for adjudicating such controversies rests on the need to strike the right balance between the interests of plaintiffs in gaining redress for allegedly tortious speech and the interests of the accused speakers in defending their First Amendment right to speak anonymously. The courts have reasoned that if the

identification burden is too high, then online wrongdoers can too easily hide behind pseudonyms to engage in libel and other wrongs with immunity. But they have also reasoned that if the burden is too low, companies or political figures that face speech that they do not like will too easily be able to strike back at their critics, enabling them to initiate extrajudicial self-help as soon as the critics are identified, and creating a serious chilling effect that can deprive the marketplace of ideas of the important information and opinions that some may be motivated to express only if they can be confident that they can maintain their privacy so long as their speech is **not** actionable.

As the Court of Appeals recognized, the Supreme Court of the United States has repeatedly held that the First Amendment comprehends the right to speak anonymously:

> [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 v. Ohio Elections Comm.*, 514 U.S. 334, 341-342, 356 (1995).

The Supreme Court also said that only a compelling government interest can overcome the right to speak anonymously. *Id*. at 348. Thus, what courts in other states have had to decide is whether the mere filing of a complaint that states a cause of action creates a compelling government interest, or whether more is required.

The court below apparently thought that it need not find a "compelling interest" because of its erroneous assumption, addressing an issue not raised by either party, that the criticisms of Hadeed were necessarily commercial speech. 752 S.E.2d 560-561 & n. 4. However, criticism of a commercial product or service is not commercial speech simply because it might injure the plaintiff's business interests. *CPC Int'l v. Skippy Inc.*, 214 F.3d 456, 462-463 (4th Cir. 2000)*; Nissan Motor v. Nissan Computer*, 378 F.3d 1002, 1017 (9th Cir. 2004). *See also Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984) (applying full First Amendment protection to review of a consumer product). Indeed, the Supreme Court has taken a narrow view of commercial speech, noting that it is "usually defined as

speech that does no more than propose a commercial transaction." *United States v. United Foods*, 533 U.S. 405, 409 (2001).

The opinion below suggested that the other states have reached widely varying results on this point, but although each state court has worded its opinion slightly differently, there is a remarkable uniformity in the standards adopted elsewhere. Following the lead of the first state appellate court to address the question, *Dendrite v. Doe*, 775 A.2d 756 (N.J. App. 2001), appellate courts in Arizona, California, Delaware, Indiana, Maryland, New Hampshire, New Jersey, Pennsylvania, and Texas, as well as the District of Columbia, have each held that a plaintiff cannot obtain the identity of a defendant who is alleged to have engaged in wrongful speech unless the plaintiff can present admissible evidence of the elements of the cause of action that the plaintiff alleges.[1] In the defamation context, the test requires evidence of falsity and, depending on state law, evidence of damages. Two other states have construed their

[1] *In re Indiana Newspapers,* 963 N.E.2d 534 (Ind. App. 2012); *Pilchesky v. Gatelli*, 12 A.3d 430 (Pa. Super. 2011); *Mortgage Specialists v. Implode-Explode Heavy Indus.*, 999 A.2d 184 (N.H. 2010); *Solers, Inc. v. Doe*, 977 A.2d 941 (D.C. 2009); *Independent Newspapers v. Brodie*, 966 A.2d 432 (Md. 2009); *Krinsky v. Doe 6*, 72 Cal. Rptr.3d 231 (Cal. App. 2008); *In re Does 1-10*, 242 S.W.3d 805 (Tex. App. 2007); *Mobilisa v. Doe,* 170 P.3d 712 (Ariz. App. 2007); *Doe v. Cahill,* 884 A.2d 451 (Del. 2005).

own court rules either to demand evidence before the subpoena can be sought or, at least, to give the anonymous defendant the opportunity to obtain a protective order unless such evidence is provided.[2] Six of the ten states apply an equitable balancing test, analogous to a preliminary injunction standard, even if the plaintiff meets the test of presenting minimal evidence of the elements of the cause of action.[3] But Virginia now stands alone as the only state whose jurisprudence has declined to protect the First Amendment anonymous-speech rights of Internet speakers by refusing to compel the disclosure of identifying information without any evidence.[4] Yelp is concerned that if the Court of Appeals

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[2] In Illinois, the lead case is *Maxon v. Ottawa Pub. Co.*, 929 N.E.2d 666 (Ill. App. 3d Dist. 2010). In Michigan, the first panel to address the question chose to address the issue only under the state rules of court, *Thomas M. Cooley Law School v. Doe 1*, 833 N.W.2d 331 (Mich. App. 2013); the second panel endorsed the *Dendrite* approach and invited the Michigan Supreme Court to resolve the difference. *Ghanam v. Does*, — N.W.2d —, 2014 WL 26075 (Mich. App. Jan. 2, 2014).

[3] *Dendrite, supra; Independent Newspapers*; *Indiana Newspapers Mortgage Specialists; Mobilisa, supra; Pilchesky, supra.*

[4] Federal courts have repeatedly followed *Cahill* or *Dendrite*. *E.g.*, *Highfields Capital Mgmt. v. Doe*, 385 F. Supp.2d 969, 976 (N.D. Cal. 2005) (required an evidentiary showing followed by express balancing of "the magnitude of the harms that would be caused to the competing interests"); *Art of Living Foundation v. Does 1-10*, 2011 WL 5444622 (N.D. Cal. Nov. 9, 2011) (endorsing the *Highfields Capital* test); *Fodor v. Doe*, 2011 WL 1629572 (D. Nev. Apr. 27, 2011) (following *Highfields Capital*); *Koch Industries v. Doe*, 2011 WL 1775765 (D. Utah May 9, 2011) ("The case law

decision stands, and a company is able to identify its critics by doing no more than representing that it believes that its critics are not customers, consumers and others who have valuable contributions to make to public debate, but who worry about retaliation, will be chilled into silence. The Court should grant review to decide whether Virginia should depart from the broad consensus among state courts that have addressed this issue.

B. The Court of Appeals relied heavily on the argument that the Virginia Legislature had deliberately refused to follow the example of other states that require an evidentiary showing that the lawsuit has potential merit. The panel therefore believed that embracing Yelp's position required a ruling that § 8.01-407.1 is unconstitutional, a decision the panel refused

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. . . has begun to coalesce around the basic framework of the test articulated in *Dendrite*," *quoting SaleHoo Group v. Doe*, 722 F. Supp.2d 1210, 1214 (W.D. Wash. 2010)); *Best Western Int'l v. Doe*, 2006 WL 2091695 (D. Ariz. July 25, 2006) (court used a five-factor test drawn from *Cahill*, *Dendrite,* and other decisions); *In re Baxter*, 2001 WL 34806203 (W.D. La. Dec. 20, 2001) (preferred *Dendrite* approach, requiring a showing of reasonable possibility or probability of success); *Sinclair v. TubeSockTedD*, 596 F. Supp.2d 128, 132 (D.D.C. 2009) (court did not choose between *Cahill* and *Dendrite* because plaintiff would lose under either standard); *Alvis Coatings v. Does*, 2004 WL 2904405 (W.D.N.C. Dec. 2, 2004) (court ordered identification after considering a detailed affidavit about how certain comments were false); *Doe I and II v. Individuals whose true names are unknown*, 561 F. Supp.2d 249 (D. Conn. 2008) (identification ordered only after the plaintiffs provided detailed affidavits showing the basis for their claims of defamation and intentional infliction of emotional distress).

to make because of the presumption in favor of constitutionality. There are several flaws in this argument.

First, there are many situations in which a state statute, a federal statute, and the constitution provide alternate bases for individuals to assert rights against government action. For example, a journalist may enjoy protection against disclosure of sources or of other confidential information under a state shield statute as well as the First Amendment. A public employee may be protected against racial discrimination, or against retaliation based on the exercise of the right to criticize a public official or to "blow the whistle," under a state statute, a federal statute, and the First or Fourteenth Amendment. When a court decides that the Constitution provides protection even though the state statute does not, the court need not decide that the state statute is unconstitutional; if the federal statute protects but the state statute does not, the state statute need not fail under the Supremacy Clause. In these situations, the different sources of authority do not conflict; they simply offer alternate paths to relief. So, here, a court can find that the First Amendment affords protection against a subpoena even though § 8.01-407.1 does not, without declaring section 8.01-407.1 unconstitutional.

Second, the court below was wrong in deciding that the adoption of

section 8.01-407.1 represented a policy choice to reject "persuasive authority from other states," 752 S.E.2d at 703. The court relied in large part on a report that was presented to the legislature and that "canvasses the existing caselaw directly on the topic." *Id.* at 697.[5] In fact, the report that was provided to the Legislature was finished in 2001 (*see* report's cover letter, dated November 30, 2001), long before the national consensus standard requiring evidence and not just allegations had developed. The report remarked on the "absence of fully articulated . . . case law," *id.* at 23, lamented that "no state or federal appellate court has yet endorsed a particular formulation," *id.* at 24, and said that outside Virginia, "only two 'tests' have been reported," citing a 1999 federal trial court decision (since superseded by *Highfields Capital Mgmt. v. Doe*, 385 F. Supp.2d 969 (N.D. Cal. 2005), which endorsed *Dendrite*) and one state trial court decision (in *Dendrite*, even though it was the later **appellate** decision in *Dendrite* that adopted the requirement that evidence be presented). The report did not mention any test requiring evidence; hence, the assumption that the Legislature's consideration of this report implies a

[5]The report can be found online at http:///leg2.state.va.us/dls/h&sdocs.nsf/fc86c2b17a1cf388852570f9006f1299/51339235f9947 94285256b21006a2406/$FILE/SD9_2002.pdf.

rejection of that test was erroneous.

Third, the language of § 8.01-407.1 can easily be read as incorporating the evidence requirement that other states have held to be required by the First Amendment. Section 8.01-407.1(A)(1)(a) requires a plaintiff seeking discovery to show

> that one or more communications that are or may be tortious or illegal have been made by the anonymous communicator, or that the party requesting the subpoena has a legitimate, good faith basis to contend that such party is the victim of conduct actionable in the jurisdiction . . ..

Although these prongs are in the alternative, **each prong** replicates what the courts in other states are trying to accomplish by their evidence-requiring First Amendment tests. Under the second prong of subsection (a) above, it is not enough for the plaintiff to show good faith; it must show a "legitimate" basis for claiming that the speech was tortious. That requirement is entirely consistent with the rule in other states that a plaintiff seeking relief must show an evidentiary basis for its claim. Similarly, the first prong's words "are or may be tortious" parallel the "early look" principles that underlie the analysis in *Dendrite* and similar cases, using the existence of evidence of falsity and damages to test whether the plaintiff has a realistic claim or only an imaginary one. In addition, under subsection (b) of § 8.01-407.1, the plaintiff must show that identifying

information is "centrally needed to advance the claim," or relates to a "core claim or defense," or is "directly and materially related to that claim." If the plaintiff bringing a defamation claim does not even have evidence that a statement about the plaintiff is false, or that the statement has caused damage to its business reputation, then the identifying information is not "needed"—the claim could still not succeed even if the identifying information were obtained. Consequently, this requirement parallels the *Dendrite* standard for adjudicating subpoenas.

C. The lower court's anonymity analysis erred in other significant respects. For example, as both parties' briefs recognized, because Yelp was arguing that enforcement of the subpoena violated the First Amendment, the Court of Appeals was required to conduct an independent review based on the record as a whole, rather than applying a deferential standard of review. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 505-511 (1984). The court below, however, affirmed the trial court by applying an abuse of discretion standard. 752 S.E.2d at 707.[6]

The majority found that Hadeed had made a sufficient showing in

[6]Even if the panel were correct that the reviews at issue were commercial, contrary to Yelp's argument above, *Bose* review applies in commercial speech cases. *Peel v. Attorney Registr. and Disc. Comm.*, 496 U.S. 91, 108 (1990).

support of the subpoena by simply asserting its "belief" that the Does were not actual customers, but as Judge Haley pointed out in dissent, Hadeed never denied the substance of the Does' reviews—that despite its ubiquitous $99 coupon offers, Hadeed charges much more money for carpet cleaning, in the nature of a bait-and-switch tactic. Hadeed's reputation is not affected by whether reviewers are customers or not—it is only the possible falsity of the bait-and-switch allegations that could hurt Hadeed's business reputation. And the Supreme Court of the United States confirmed last week that the First Amendment requires a libel plaintiff to prove not just literal falsity but also **material** falsity. *Air Wisconsin Airlines Corp. v. Hoeper*, — S.Ct. —, 2014 WL 273239 at *9 (Jan. 27, 2014), *citing Masson v. New Yorker Magazine*, 501 U.S. 496, 517 (1991). The lower court's failure to apply the correct standards in a First Amendment case is yet another reason why this Court should grant review.

II. THE TRIAL COURT LACKED JURISDICTION TO SUBPOENA DOCUMENTS FROM YELP.

The court below held that the Virginia courts had jurisdiction to compel Yelp to bring documents from its San Francisco headquarters to Alexandria in response to Hadeed's subpoena because section 8.01-201

of the Virginia Code allows a foreign corporation authorized to do business in Virginia to be served through its registered agent, because Code § 13.1-766 allows service on a registered agent of any process "required or permitted by law to be served upon the corporation," and because a subpoena is "process" under *Bellis v. Commonwealth*, 241 Va. 257 (1991). The flaw in this reasoning is that none of these authorities address the issue of jurisdiction. In fact, using a Virginia court to compel a foreign corporation to produce documents simply because it has a registered agent in the state runs counter to a long tradition under which the procedure for obtaining evidence from a non-party foreign corporation is to obtain a commission to the court of the corporation's own jurisdiction. The mere fact that Yelp's web site can be accessed through computers located in Virginia is not a sufficient basis for such jurisdiction.

As the United States Court of Appeals for the Fourth Circuit said in *ALS Scan v. Digital Service Consultants*, 293 F.3d 707, 712-713 (4th Cir. 2002), predicating personal jurisdiction on the mere fact that Yelp enables its users to make statements accessible in Virginia through the Internet offends traditional principles of state sovereignty:

> [T]he Internet is omnipresent—when a person places information on the Internet, he can communicate with persons in virtually every jurisdiction. If we were to conclude as a

> general principle that a person's act of placing information on the Internet subjects that person to personal jurisdiction in each State in which the information is accessed, then the defense of personal jurisdiction, in the sense that a State has geographically limited judicial power, would no longer exist. The person placing information on the Internet would be subject to personal jurisdiction in every State.
> * * *
> In view of the traditional relationship among the States and their relationship to a national government with its nationwide judicial authority, it would be difficult to accept a structural arrangement in which each State has unlimited judicial power over every citizen in each other State who uses the Internet.

So far as counsel have been able to discover, every state that has addressed the question has held that it lacks jurisdiction to subpoena individuals and companies located outside the borders of the state, without employing the "minimum contacts" analysis of the Fourteenth Amendment that governs the exercise of specific jurisdiction.[7] That is why every state

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[7] *Colorado Mills v. SunOpta Grains & Foods*, 269 P.3d 731, 733-734 (Colo. 2012); *Quest Diagnostics v. Swaters*, 94 So.3d 635 (Fla. Dist. Ct. App. 2012); *Laverty v. CSX Transp.*, 956 N.E.2d 1 (Ill. App. 2010); *Syngenta Crop Protection v. Monsanto Co.*, 908 So. 2d 121 (Miss. 2005); *In re National Contract Poultry Growers' Ass'n*, 771 So. 2d 466 (Ala. 2000); *Craft v. Chopra*, 907 P.2d 1109, 1111 (Okla. Civ. App. 1995); *Phillips Petroleum Co. v. OKC Ltd. P'ship*, 634 So.2d 1186, 1187-1188 (La. 1994); *Armstrong v. Hooker*, 661 P.2d 208, 209 (Ariz. App. 1982); *John Deere Co. v. Cone*, 124 S.E.2d 50, 53 (S.C. 1962). *See also Cates v. LTV Aerospace Corp.*, 480 F.2d 620, 623-624 (5th Cir. 1973) (subpoena cannot command production of documents in federal district court different from the one in which the documents are maintained); *Chessman v. Teets*, 239 F.2d 205, 213 (9th Cir. 1956), *rev'd on other grounds,* 354 U.S. 156 (1957) (same); *Wiseman v. American Motors Sales Corp.*, 479 N.Y.S.2d 528 (N.Y. App. Div. 1984) (trial court subpoena to

has adopted some version of the Uniform Interstate Depositions and Discovery Act ("UIDDA"). In Virginia, the relevant statute is sections 8.01-412.8 *et seq.* of the Virginia Code. California has made it particularly easy for out-of-state parties to obtain California process in aid of civil suits in their own jurisdictions by providing that a request for an issuance of a subpoena in aid of out-of-state proceedings "does not constitute making an appearance in the courts of this state," California Code of Civil Procedure § 2029.300(a), and hence may be effected by the party's out-of-state attorney. These provisions would rarely be needed if Hadeed's expansive notions of subpoena jurisdiction were sound, expanding Virginia's power to subpoena anybody who communicates through Internet web pages accessible in Virginia and to any company that is engaged in interstate commerce including Virginia.[8]

The fact that Yelp complies with Virginia law by registering an agent for service of process does not subject Yelp to subpoena jurisdiction in Virginia. Several courts have expressly rejected the proposition that

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non-party witness could not be enforced; proper procedure is to secure commission to seek discovery under authority of court in witness's own state).

[8] Under *Daimler AG v. Bauman*, 134 S. Ct. 746, 749 (2014), even "a substantial, continuous, and systematic course of business" in Virginia would not be enough to subject Yelp to general jurisdiction here.

having a registered agent for service of process subjects the corporation to subpoena jurisdiction that would not otherwise exist. *Quest Diagnostics v. Swaters*, *supra*; *Ariel v. Jones*, 693 F.2d 1058, 1060-1061 (11th Cir. 1982). For example, in *Syngenta Crop Protection v. Monsanto Co.*, 908 So. 2d 121, 128 (Miss. 2005), reviewing a statute virtually identical to Virginia Code § 13.1-766, the court said "[t]here is no doubt that the statutory language stating that a foreign corporation's registered agent is that corporation's agent 'for service of process, notice or demand required or permitted by law to be served on the foreign corporation,' does not authorize a party's service of a subpoena duces tecum upon nonresident nonparties." Similarly, in *Phillips Petroleum Co. v. OKC Ltd. Partnership*, 634 So.2d 1186, 1187-1188 (La. 1994), the court said, "A principal consequence of designating an agent for service of process is to subject the foreign corporation to jurisdiction in a Louisiana court. Finding CKB subject to the personal jurisdiction of Louisiana courts, however, does not necessarily mean that this Texas corporation is bound to respond to a subpoena, duly received, by having to appear and produce documents in a Louisiana court in a lawsuit in which they are not a party."

It was the tradition of limiting subpoena jurisdiction over foreign corporations, and requiring litigants to use UIDDA, that compelled the

plaintiffs in *AOL v. Nam Tai Electronics*, 264 Va. 583 (Va. 2002), and *AOL v. Anonymous Publicly Traded Co.*, 261 Va. 350 (2001), to obtain Virginia process to compel disclosures by America Online ("AOL"), a Virginia company, instead of compelling AOL to produce identifying information through process from the California and Indiana courts, respectively. If Virginia walks away from this traditional understanding of the limits of subpoena jurisdiction, other states are likely to do so as well. Virginia businesses would then be subject to having their confidentiality interests subject to adjudication in courts that may be much less deferential to their concerns about such matters as trade secrets and other important concerns, and much more attentive to the countervailing interests of local businesses or individual litigation adversaries than courts in this state might be.

The legislature, not the courts, should decide whether to extend Virginia's jurisdiction in that way, risking the possibility that other states may similarly stop according Virginia corporations the privilege of defending the privacy of their own documents in the Virginia courts.

CONCLUSION

The petition for appeal should be granted.

Respectfully submitted,

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February 6, 2014

CERTIFICATE

Pursuant to Rule 5:17(i) of the Supreme Court of Virginia, I hereby certify the following:

1. The petitioner, Yelp Inc., is represented by

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3. I am causing seven copies of this petition to be filed on this date by hand with the Clerk of the Supreme Court, and one copy of the petition to be sent on this date by UPS Ground to counsel for appellee at the address shown above.

February 6, 2014 Paul Alan Levy