

IN THE
Supreme Court of Virginia

RECORD NO. 140242

YELP INC.,

Non-party respondent-appellant,

v.

HADEED CARPET CLEANING,

Plaintiff-Appellee.

REPLY BRIEF SUPPORTING PETITION FOR APPEAL

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In seeking review on the merits, Yelp urged the Court to bring Virginia into the mainstream of jurisdictions where plaintiffs seeking to identify their anonymous detractors so that they can press lawsuits based on allegedly wrongful speech must first make both a legal and an evidentiary showing that their claims have potential merit. In its Brief in Opposition to Petition for Appeal (“Hadeed BiO”), Hadeed Carpet Cleaning significantly overstates the burdens that the national consensus standard for identifying anonymous defendants imposes on a business like Hadeed when it seeks to strip anonymous speakers of their First Amendment right to speak anonymously. Hadeed also ignores the impact of the standard it defends on the right to speak anonymously and understates the degree of protection that the First Amendment accords speakers who, at the outset of litigation, have only been **alleged** to have broken the law; at that juncture there has been no finding of wrongdoing. In some respects, Hadeed declines to defend the rationale of the Virginia Court of Appeals, urging that the lower court reached the right result with respect to enforcement of the subpoena, even if its reasoning was wrong. Hadeed’s response thus shows the need for this Court to grant review and hence decide the proper legal standard for assessing the viability of subpoenas to identify anonymous defendants.

1. The National Consensus Standard Is a Balancing Test Under Which Plaintiffs With Valid Claims Routinely Succeed, While Providing Protection Against Needless Loss of the Right to Speak Anonymously.

The petition explained that the consensus approach followed in such states as Maryland, New Jersey, and Delaware, indeed in every state that has reached the issue, requires a plaintiff to come forward with both legal argument and an evidentiary basis showing that the plaintiff has a realistic claim against the anonymous speakers that it seeks to identify through compulsory process. Hadeed does not dispute that this **is** what courts in all the other states do.

Yet Hadeed posits that adoption of this standard “would be a license to defame, so long as the defamers publish their speech anonymously.” Hadeed BiO 14. Far from it. *Dendrite v. Doe*, 775 A.2d 756 (N.J. App. 2001), and *Doe v. Cahill*, 884 A.2d 451 (Del. 2005), set forth a balancing test that is intended to allow plaintiffs with viable defamation cases to identify their critics and proceed to secure damages or other appropriate relief. Among the cases following *Dendrite* and *Cahill* that were cited in the Petition for Appeal, the plaintiffs obtained discovery in *Fodor v. Doe*, 2011 WL 1629572 (D. Nev. Apr. 27, 2011); *Doe I and II v. Individuals whose true names are unknown*, 561 F. Supp.2d 249 (D. Conn. 2008); *Alvis Coatings*

v. Does, 2004 WL 2904405 (W.D.N.C. Dec. 2, 2004); and *In re Baxter*, 2001 WL 34806203 (W.D. La. Dec. 20, 2001). In *Immunomedics v. Doe*, 775 A.2d 773 (N.J. App. 2001), a companion case to *Dendrite*, the court ordered that the anonymous speaker be identified. In *Dendrite* itself, two of the Does were identified while two were protected against discovery. 775 A.2d at 764. Consequently, there is no basis for Hadeed's contention that the national consensus standard pays too little heed to the interests of libel plaintiffs in securing redress for their grievances. Indeed, defamation law is alive and well in Maryland, Delaware, New Jersey, New Hampshire, Texas, and the various other states that follow this approach, and Hadeed does not show otherwise.

But although the national consensus standard can routinely be met by criticized businesses that have genuine defamation claims, the showing that the Court of Appeal held acceptable under Va. Code § 8.01-407.1 is so low that it provides a "license to unmask" without any basis. A business can easily claim that it has doubts about whether a given anonymous critic was really one of its customers, even if, as in this case, the critic's comments are typical of what many other consumers have said about the business, and hence can demand the identity of the critic so that it can

satisfy itself of the critic's bona fides, if it knows that the trial court will not demand an evidentiary basis for the expressed doubts. And the ability to bring such lawsuits and compel identification will doubtless have a chilling effect on criticism of that business. The decision below thus provides a road map for the obliteration of the right to criticize anonymously, and hence runs counter to the First Amendment right to speak anonymously.

2. Hadeed Overstates the Difficulty of Meeting the National Consensus Standard.

Hadeed characterizes Yelp's argument as proposing that the trial court conduct an "evidentiary hearing" or "put [Hadeed] on trial," Hadeed BiO 14, 20, and contends that under the consensus standard it would have to "prove that the anonymous reviewers were not actually Hadeed's customers." *Id.* at 13. Not so. What Hadeed needs to do to meet the evidentiary standard is to show how and why it has a basis for contending that the Doe defendants made false statements.¹

Hadeed contends that it has "studied" its own customer database,

¹Hadeed suggests that Yelp did not make this argument below. Not only did Yelp expressly argue for an evidence requirement, e.g., Opening Brief in Court of Appeals ("AOB") at 28 (Brief Caption: "Hadeed Presented No Evidence That the Doe Defendants Made Any False Statement"), but Hadeed's own brief in the Court of Appeals complained about the fact that Yelp had argued in the circuit court that Hadeed had failed to offer evidence of falsity. Hadeed Appellate Brief at 29.

but that it found no “matches” with the incidents reported in the challenged reviews; relying on that vague analysis, Hadeed claims that it has a basis for contending that the reviewers must not have been customers. Because that is the claim of falsity on which Hadeed has chosen to rest its defamation claim—implicitly false statements that the reviewers were customers—Hadeed needed to present evidence to support its contention that its customer database contains sufficient detail to support an inference that the individuals who made the claims could not have been its customers. Again, contrary to Hadeed’s opposition to the petition, Yelp does not argue that Hadeed must “prove that the anonymous reviewers were not [its] customers”; Hadeed need only present evidence sufficient to support an inference that the reviewers were not customers. Otherwise, a trial court is not in a position to make its own judgment about whether there is a sufficient basis for overcoming the reviewers’ First Amendment right to speak anonymously; it can only rubber-stamp Hadeed’s conclusory assertion that it has a good faith basis for harboring that belief.

Nor, indeed, is Yelp in any position to present first-hand evidence about whether the customers’ depiction of Hadeed’s business practices are justified, before the trial court can decide whether to enforce the subpoena,

as Hadeed says it might. BiO at 20. Yelp is not a former Hadeed customer and has no documentation of Hadeed's business practices; such presentations would be the exclusive province of the Does, if and when they are identified.

3. Hadeed Understates the First Amendment Protection for the Anonymous Defendants' Speech, Yet Does Not Defend the Court of Appeals' Commercial Speech Analysis.

One of the grounds for appeal is that the Court of Appeals simply assumed that the Does' criticisms of a business is necessarily commercial speech which, consequently, justified a lower degree of First Amendment protection and avoided the need for Hadeed to show a "compelling interest" justifying court-ordered identification. The petition for appeal (at 22-23) cited several cases holding that criticisms of businesses are not commercial speech, and Hadeed does not defend the lower court's holding in that regard; instead, Hadeed argues, without any citations or indeed any reasoning, that criticism of a business is somehow less protected than, for example, "literary, religious or political speech." Hadeed BiO 19.

In lieu of embracing the Court of Appeals' theory that the Does enjoy less First Amendment protection because their speech was commercial, a pervasive theme of Hadeed's BiO is that their speech enjoys **no**

constitutional protection because it is “defamation speech.” BiO 14, 19-20. But at this stage of the proceedings there has been no determination that the speech is false or otherwise defamatory; on this record, the Does’ criticisms have only been alleged to be defamatory, and the mere existence of such allegations does not render the speech unprotected. Similarly, when Hadeed says, “**If their postings were defamatory**, the postings were not entitled to First Amendment protection,” BiO 22 (emphasis added), its argument again assumes the conclusion.

The function of the consensus approach to First Amendment regulation of subpoenas to identify anonymous speakers is to avoid such question-begging by asking the Court to take an early, tentative look at whether the plaintiff has a sufficiently realistic chance of prevailing on a defamation claim, based on both law and preliminary evidence, to warrant divesting the speakers of the First Amendment right to keep their speech anonymous. Hadeed’s test proposes to take the plaintiff at its lawyer’s bare words and require no evidence whatsoever before the Court awards plaintiff the significant relief of identifying its detractors and depriving the defendants of their right to speak anonymously.

4. Hadeed Does Not Defend the Lower Court's Abuse of Discretion Standard.

Another reason for review proposed by the Petition for Appeal is the Court of Appeals' use of an abuse of discretion standard instead of the independent review on the entire record required by *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), the correct standard of review that **both** parties argued should apply given the First Amendment issues in the case.

Hadeed acknowledges that *Bose* review was required but urges affirmance on the grounds that the Court of Appeals "examined the record with great care," BiO 24, and in any event Hadeed believes that its showing was sufficient to meet the requirements of Va. Code § 8.01-407.1 and hence the Court of Appeals' decision was correct. Yelp does not take issue with the effort of the lower court, but we take the majority at its word when it said, repeatedly, that although it was examining the whole record, it was deciding how the various prongs of section 8.01-407.1 would apply under an abuse of discretion standard. 62 Va. App. at 703, 704, 706, 707. Once this Court resolves the legal question of the proper standard of review, it will have the option of proceeding to resolve the appeal by deciding for itself whether Hadeed made a sufficient evidentiary showing,

or it may choose to remand for consideration of the case under a proper standard; indeed, the lower courts should allow Hadeed another opportunity to submit factual evidence supporting the merits of its claims.

5. Yelp Did Not Waive Its Jurisdictional Objection.

Hadeed urges the Court not to grant review to consider whether subpoena jurisdiction can be exercised over Yelp on a ground that Hadeed never raised in the lower courts—that Yelp waived its jurisdictional objections by arguing for its users’ First Amendment rights. BiO 24, citing Va. Code. § 8.01-277.1. But Yelp would only waive its jurisdictional concerns if it “engage[d] in conduct related to adjudicating the merits of the case.” Yelp never did that; it argued only about whether the court should take the preliminary step of ordering identification of the Doe defendants. And Yelp did not challenge the constitutionality of Va. Code § 8.01-407.1, as Hadeed argues, BiO 24; Yelp’s consistent position has been (a) that section 8.01-407.1 and the First Amendment offer parallel protections, (b) that the statute can and should be construed as incorporating the First Amendment protections that other states have implemented by common-law adjudication, and (c) in any event, that even if the First Amendment requires a greater showing than the statute does, the statute is

nevertheless constitutional because it does not **require** a trial court to enforce a subpoena that fails to meet First Amendment standards.²

6. The Court of Appeals Ruling Portends Forum Shopping.

If the ruling below stands on the First Amendment and jurisdictional issues, then litigants from other states may come forum-shopping to Virginia, hoping to take advantage of the lower barriers that the Court of Appeals approved as being sufficient to warrant the enforcement of subpoenas to identify anonymous online speakers, and thus imposing extra burdens on the Virginia courts to resolve issues in which Virginia has no institutional interest. Yelp's registered agent in this state recently received a Virginia subpoena from a New York dentist, seeking to identify an apparently New-York-based customer, without any of the evidence that would be required to enforce that subpoena had the dentist brought suit in New York, where the procedure for pre-litigation discovery requires an order to show cause based on affidavits (there is not yet an appellate

²In a ruling issued before the Petition for Appeal, but not noted by Yelp's counsel until now, the Florida Supreme Court embraced the approach of other state courts in holding that having a registered agent so that it can be served in cases where it is subject to personal jurisdiction to be sued as a defendant does not make an out-of-state company present in the state and hence subject to the state's subpoena power. *Ulloa v. CMI, Inc.*, — So.3d —, 2013 WL 5942299, at *4-*5 (Fla. Nov. 7, 2013).

decision addressing the First Amendment standard), or if the dentist had domesticated a foreign subpoena in California. This Court should grant review to bring the state's jurisprudence into line with the rules of other states, both on the issue of subpoena jurisdiction over third-party corporations and on the issue of the First Amendment protections for anonymous speakers.

CONCLUSION

The petition for appeal should be granted.

Respectfully submitted,

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CERTIFICATE OF LENGTH

I certify that my word processing program counted 2250 words in this brief.

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CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 5:19, I hereby certify that:

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

April 3, 2014

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