In the
Virginia Court of Appeals

Record No. 0116-13-4

HADEED CARPET CLEANING, INC.,
Plaintiff-Appellee,

v.

JOHN DOE #1, *et al*.,
Defendants,

YELP, INC.,
Non-party respondent-Appellant.

BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN SOCIETY OF NEWS EDITORS, GANNETT CO., INC., AND THE WASHINGTON POST IN SUPPORT OF APPELLANT

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May 8, 2013

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INTEREST OF *AMICI CURIAE*

Amici are news organizations and associations of journalists that have an important interest in allowing for protection of anonymous comments on the Internet. While journalists will typically develop sources and gather information before publishing a news article, that method can never ensure that all parties with information to contribute can be heard. Many news sites thus allow for comments to be posted anonymously. While a large amount of these comments may contribute little to the public debate as posters engage in online arguments influenced by their personal politics, some of these comments have prompted further investigation by journalists and more in-depth follow-up articles. Without the guarantee of anonymity, many of these posters would have never shared their information and the public would have been less informed.

Amicus curiae The Reporters Committee for Freedom of the Press ("The Reporters Committee") is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

With some 500 members, American Society of News Editors ("ASNE") is an organization that includes directing editors of daily newspapers throughout the

Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

Gannett Co., Inc. is an international news and information company that publishes 82 daily newspapers in the United States, including *USA TODAY*, as well as hundreds of non-daily publications. In broadcasting, the company operates 23 television stations in the U.S. with a market reach of more than 21 million households. Each of Gannett's daily newspapers and TV stations operates Internet sites offering news and advertising that is customized for the market served and integrated with its publishing or broadcasting operations.

WP Company LLC (d/b/a The Washington Post) publishes one of the nation's most prominent daily newspapers, as well as a website, www.washingtonpost.com, that is read by an average of more than 20 million unique visitors per month.

FACTS AND PROCEEDINGS BELOW

Plaintiff-Appellee Hadeed Carpet Cleaning, Inc., ("Hadeed") seeks the identities of unidentified individuals who posted anonymous reviews on Yelp, the

popular online review service. *Amici* accept and incorporate the Facts and Proceedings Below as set forth in the Brief of Appellant.

SUMMARY OF ARGUMENT

By offering only a minimal discussion of the First Amendment interests at stake, the trial court failed to fully acknowledge the extent to which the First Amendment restricts compulsory identification of anonymous speakers on the Internet. When faced with questions of compelled disclosure of anonymous online speakers, this Court must adopt a meaningful standard that requires a heightened showing of evidence of a valid claim and notice to the affected parties. This standard is essential to protect the interests in anonymous speech, which often serve the public good and contribute to a better understanding of public issues and controversies.

ARGUMENT

I. The trial court erred in not recognizing the constitutional right to speak anonymously.

The First Amendment protects the right to speak anonymously across a broad spectrum of subjects, whether the expression at issue relates to most important political concerns of the day or, as here, the quality of service of a carpet cleaning company. The trial court's order suggests anonymous speech is "not

entitled to the same level of protection as truthful or political speech," but neither of the cases it cites stands for this proposition.[1] Instead, there is a robust body of precedent affirming the importance of protecting anonymous speech under the First Amendment.

The Supreme Court has upheld this interest in many contexts, observing that "[a]nonymity is a shield from the tyranny of the majority" that exemplifies a key purpose of the First Amendment: "to protect unpopular individuals from retaliation — and their ideas from suppression — at the hand of an intolerant society." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995). The right is part and parcel of the First Amendment. *See id.* at 342 (holding that "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"); *see also Watchtower Bible & Tract Soc'y v. Village of Stratton*, 536 U.S. 150, 166–67 (2002) (recognizing anonymity interests of petition circulators); *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 200 (1999) (striking down state law requiring petition circulators to wear identification badges).

Recognition of the interest in anonymous speech has deep historical roots. *See, e.g.*, *Talley v. California*, 362 U.S. 60, 64 (1960) ("Anonymous pamphlets,

[1] The trial court cited *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) and *Brown v. Hartlage*, 456 U.S. 45, 60–61 (1982), but those cases say nothing about anonymous speech.

leaflets, brochures and even books have played an important role in the progress of mankind."). The rich history of anonymous speech in the United States dates back to the founding of the nation. Revolutionary writers garnered public support for breaking away from England through newspapers and pamphlets written under pseudonyms such as "Farmer" or "A True Patriot." After the Revolution, the federalists and anti-federalists again fiercely called on the cloak of anonymity as they debated the adoption of the Constitution, writing under the names "Publius," "Cato," and "Brutus." *McIntyre*, 514 U.S. at 343 n.6.

This constitutional right applies with full force to anonymous speech on the Internet, which "constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers." *Reno v. ACLU*, 521 U.S. 844, 853 (1997). The Internet is a forum for "relatively unlimited, low-cost capacity for communication of all kinds" and "the content on the Internet is as diverse as human thought." *Id*. at 870. Accordingly, there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." *Id*.

Courts, including this state's high court, have regularly recognized the right of anonymous online expression in cases seeking to compel disclosure of Internet speakers' identities. *See, e.g.*, *Jaynes v. Virginia*, 276 Va. 443, 461 (2008) ("The right to engage in anonymous speech, particularly anonymous political or religious

speech, is 'an aspect of the freedom of speech protected by the First Amendment.'" (citing *McIntyre*, 514 U.S. at 342)). In quashing a subpoena for the identity of Internet users who posted on a company website, a federal district court in Washington state held that "Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas." *Doe v. 2TheMart.com Inc.*, 140 F.Supp.2d 1088, 1092 (W.D.Wash. 2001). A Texas appellate court vacated a subpoena mandating disclosure, ordering that the trial court consider the First Amendment rights of commenting anonymously on a blog, *see In re Does 1–10*, 242 S.W.3d 805, 819 (Tex. App. 2007), and an Arizona appellate court remanded a case to consider the First Amendment protections at stake surrounding an anonymous e-mail message sent to high-ranking officers of a corporation, *see Mobilisa v. Doe*, 170 P.3d 712, 715 (Ariz. App. 2007).

Anonymous speech supports the free exchange of ideas. It protects speakers from a litany of negative consequences that may result from revealing their identity, including retaliation and social ostracism. *See McIntyre*, 514 U.S. at 341–42. It allows whistleblowers and those who speak out against corruption to do so freely. While many of these interests in anonymous speech go right to the heart of its role in a democratic system, there are also more practical interests in protecting speech of a more routine or mundane nature, such as the critiques of local businesses at issue in this case. Online commenters have interests in maintaining

their privacy, and these speakers should not have to reveal identifying information about themselves just to participate in a conversation. Anonymity allows speakers to protect information about themselves they might be uncomfortable revealing. There is a

> legitimate and valuable right to participate in online forums anonymously or pseudonymously. . . . This ability to speak one's mind without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate.

Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 578 (N.D. Cal. 1999).

II. The tension between a plaintiff's ability to litigate a claim and the First Amendment right to speak anonymously is best resolved by recognizing a heightened standard for compelled disclosure of identities.

The Virginia Legislature has enacted a statute to guide courts in deciding when to allow compelled disclosure of anonymous posters. *See Va. Code* § 8.01-407.1. That statute must be read broadly in a manner that recognizes important First Amendment rights while allowing for reasonable litigation over meritorious claims.

A. Reading the Virginia statute to allow disclosure of any speech that "may be tortious" simply based on an unsupported allegation is inconsistent with the First Amendment.

Under the Virginia statute, if the identity of the speaker is sufficiently material to a core claim or defense, the requester must show "[t]hat one or more communications that are or may be tortious or illegal have been made by the anonymous communicator." *Id.* at (1)(a), (1)(c). Reading the requirement that the

communication "may be tortious" too narrowly, holding that a plaintiff's mere allegation without further evidence is sufficient to identify the speaker, does not protect the speaker's First Amendment rights.

The trial court cited several cases for the proposition that "defamatory speech is not entitled to the same protection as truthful or political speech," effectively removing this case from the ambit of the First Amendment. See Order at 2 (citing *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952); *Am. Online, Inc. v. Nam Tai Elecs., Inc.*, 264 Va. 583, 595 (2002); *Chaves v. Johnson*, 230 Va. 112, 122 (1985)). Neither the Virginia cases nor the Supreme Court cases cited by the trial court are applicable here, however, because they rely on an adjudication of defamation. In *Chaves*, there had already been significant fact finding and a jury determination that the defendant was a tortfeasor. *See Chaves*, 230 Va. at 112. In *Firestone*, which is cited by *Chaves*, a jury likewise found facts to support a libel judgment. *See Time, Inc. v. Firestone*, 424 U.S. 448, 452 (1976) ("Based on a jury verdict for respondent, that court entered judgment against petitioner for $100,000[.]"). And in *Beauharnais*, the petitioner had been convicted by a jury under a criminal libel statute. *See Beauharnais*, 343 U.S. at 253.

In other words, speech is not protected if it is proven false; but revealing the identity of a speaker before such proof is offered eliminates the interest in remaining anonymous, which cannot be restored if the proof is later found to be

insufficient. The harm coming from loss of the First Amendment rights can be significant and permanent. *See, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Melvin v. Doe*, 836 A.2d 42, 50 (Pa. 2003) (holding that once an identity is disclosed, the "First Amendment claim is irreparably lost as there are no means by which to later cure such disclosure").

While the trial court looked only at the statute, it should have considered the issue more broadly in light of the important constitutional rights at stake. As one federal district court has observed:

> If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights. Therefore, discovery requests seeking to identify anonymous Internet users must be subjected to *careful scrutiny* by the courts.

2theMart.com, 140 F.Supp.2d at 1093 (emphasis added). In *2theMart.com*, an anonymous Doe who commented on a blog successfully quashed the subpoena to force him to identify himself. *Id.* at 1097–98. The district court in Washington state advocated a cautious approach, observing that "unmeritorious attempts to unmask the identities of online speakers" would profoundly and negatively affect Internet speech. *Id.* at 1093.

The court's power to compel an anonymous online speaker to identify himself or herself should not be handled lightly. "People who have committed no

wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identity." *Seescandy.com*, 185 F.R.D. at 578. In *Seescandy.com*, the federal district court in California ordered the plaintiff to provide additional information, to ensure that a subpoena to identify anonymous online speakers would "only be employed in cases where the plaintiff has in good faith exhausted traditional avenues for identifying a civil defendant pre-service" and that "use of this method to harass or intimidate" would be avoided. *Id*.

In *Cahill*, the Delaware Supreme Court warned of abuse if a plaintiff is able to "sue first" and "ask questions later." *Doe v*. *Cahill*, 884 A.2d 451, 457 (Del. 2005). "[T]here is reason to believe that many defamation plaintiffs bring suit merely to unmask the identities of anonymous critics." *Id*. "Sue first, ask questions later," if paired with minimal protections for the anonymity of online speakers, "will discourage debate on important issues of public concern as more and more anonymous posters censor their online statements in response to the likelihood of being unmasked." *Id*.

And if unchecked, readily obtainable subpoenas could allow businesses and corporations to react to negative feedback and "intimidate their critics into silence." Lyrissa Barnet Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 866 (2000). "Armed with subpoenas, plaintiffs

often are able to discover the real identity of the John Doe who has attacked them in an Internet discussion forum. The mere fact of being uncovered may itself be enough to stop the alleged defamer from posting further messages." *Id*. at 881.

Setting the bar for compelled disclosure too low, as the statute does here, "will chill potential posters from exercising their First Amendment right to speak anonymously. The possibility of losing anonymity in a future lawsuit could intimidate anonymous posters into self-censoring their comments or simply not commenting at all." *Cahill*, 884 A.2d at 457.

If the best remedy for challenged speech is more speech to compete with it in the marketplace of ideas, then web sites that invite public participation have an interest in allowing such speech to be uninhibited and robust. If commentary is chilled by the fear of exposure of the speaker's identity, the public value of the site is lessened and the site's contribution to public discourse is negatively affected. Removing the safeguard of anonymity in the face of thinly supported allegations would inhibit the posting of ordinary conversations and opinions that interactive web sites thrive on. "[S]uits threaten to make Internet users too accountable for their speech, thereby threatening to suppress legitimate criticism along with intentional falsehoods." Lidsky, *supra*, at 888.

B. A consensus has developed requiring a heightened standard of proof and notice to the affected parties before allowing compelled disclosure of speakers.

This court should follow the lead of a number of other courts and require pleadings that would withstand a summary judgment motion on the libel issues, along with a requirement that the plaintiff take measures to notify the speaker about the subpoena, before granting a request to identify a Doe defendant. *See Dendrite Int'l, Inc. v. Doe No. 3*, 775 A.2d 756 (N.J. Super. A.D. 2001); *Mobilisa*, 170 P.3d 712 at 715; *Krinsky v. Doe 6*, 72 Cal.Rptr.3d 231, 243 (Cal. App. 2008); *Cahill*, 884 A.2d 451 at 460; *Solers, Inc. v. Doe*, 977 A.2d 941, 954–55 (D.C. 2009); *In re Indiana Newspapers, Inc.*, 963 N.E.2d 534, 552 (Ind. App. 2012); *Independent Newspapers, Inc. v. Brodie*, 966 A.2d 432, 456 (Md. 2009); *Mortgage Specs. v. Implode-Explode Heavy Indus.*, 999 A.2d 184, 193 (N.H. 2010); *Pilchesky v. Gatelli*, 12 A.3d 430, 443 (Pa. Super. 2011).

In determining the scope of this heightened standard, a New Jersey appellate court was the first to formulate a standard to ensure "that plaintiffs do not use discovery procedures to ascertain the identities of unknown defendants in order to harass, intimidate or silence critics[.]" *Dendrite*, 775 A.2d at 771. The court required that a plaintiff set forth a *prima facie* cause of action that can withstand a motion to dismiss for failure to state a claim upon which relief must be granted, produce sufficient evidence to support each element of its cause of action, and attempt to notify the anonymous speaker through the same site on which the speaker posted the comments. *Id.* at 760. Finally, the *Dendrite* court required that

"the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed." *Id*. at 760-61.

Since *Dendrite*, other courts have followed similar paths in establishing a heightened pleading standard. Maryland adopted the *Dendrite* standard almost directly, in a case involving the public comments on a news organization's web site. "[W]e believe that a test requiring notice and opportunity to be heard, coupled with a showing of a prima facie case and the application of a balancing test … most appropriately balances a speaker's constitutional right to anonymous Internet speech with a plaintiff's right to seek judicial redress from defamatory remarks." *Brodie*, 966 A.2d at 456. The court found a lesser standard, such as a "good faith" showing of need, "would inhibit the use of the Internet as a marketplace of ideas, where boundaries for participation in public discourse melt away and anyone with access to a computer can speak to an audience larger and more diverse than any of the Framers could have imagined." *Id*. (internal quotation marks omitted).

Some courts, particularly the high courts of Delaware and the District of Columbia, have framed the *Dendrite* standard in terms of requiring sufficient evidence to survive a summary judgment standard. *See, e.g*., *Cahill*, 884 A.2d at 460 ("We conclude that the summary judgment standard is the appropriate test by

which to strike the balance between a defamation plaintiff's right to protect his reputation and a defendant's right to exercise free speech anonymously."); *Solers*, 977 A.2d at 955–56 (D.C. 2009) ("the test we now adopt closely resembles the "summary judgment" standard articulated in *Cahill*.").

The *Cahill* court, however, adopted a more limited version of the *Dendrite* test, emphasizing the notice requirement and the summary judgment pleading standard and finding that the other elements were made somewhat redundant by the heightened evidentiary standard. *Cahill*, 884 A.2d at 461 ("The summary judgment test is itself the balance. … Accordingly, we adopt a modified *Dendrite* standard: … the plaintiff must make reasonable efforts to notify the defendant and must satisfy the summary judgment standard.")

The notice requirement is essential, so that the speakers, who will be most directly affected by the litigation, have an opportunity to advance their interests. "The notification provision imposes very little burden on a defamation plaintiff while at the same time giving an anonymous defendant the opportunity to respond. When First Amendment interests are at stake we disfavor ex parte discovery requests that afford the plaintiff the important form of relief that comes from unmasking an anonymous defendant." *Cahill*, 884 A.2d at 460-61. *See also Mobilisa*, 170 P.3d at 719, 722 ("A court should not consider impacting a speaker's First Amendment rights without affording the speaker an opportunity to

respond to the discovery request. … The purpose of the notification requirement is to ensure that Doe knows his First Amendment rights may be in jeopardy.")

This Court for similar reasons should follow at least these two elements from the *Dendrite*/*Cahill* tests. Here, the trial court did not apply a heightened standard and failed to consider whether Hadeed offered enough evidence to surmount a summary judgment motion. By finding that the "statements are tortious if not made by customers of Hadeed Carpet Cleaning," the trial court overlooked that Hadeed merely filed a complaint alleging defamation and did not offer any evidence that the published statements were false or that they actually caused any damage to the company's reputation.

The trial court's finding of tortious behavior on such bare allegations is not the same kind of robust fact finding that occurred in cases where defamatory speech was recognized as falling outside the First Amendment's protections and does not reflect the heightened examination required by the wide array of courts that have followed the *Dendrite*/*Cahill* standards. Instead, a heightened standard provides a way for this Court to read its statute in accordance with important First Amendment interests. The Plaintiffs here have failed to do so, and the order granting the subpoena should be reversed.

C. This heightened standard is important to news organizations and other Internet publishers in creating a meaningful exchange of ideas on their web sites.

News organizations recognize an important interest in allowing robust user feedback on their own news sites. Journalists typically develop sources and gather information before publishing a news article. They will interview any possible sources, judged their reliability and credibility, and even extended promises of confidentiality where warranted. But that method can never ensure that all parties with information to contribute can be heard, and readers' posts on a story, whether anonymous or not, can make valuable contributions to the story and further the public's understanding of important controversies.

And because many of those commenters could jeopardize their employment, social standing, political future or other interests if they publicly comment on certain controversies, many news sites allow for comments to be posted anonymously. Some of these comments may contribute little to the public debate as posters engage in online arguments influenced by their personal politics. But many of these comments will prompt further investigation by journalists and more in-depth follow-up articles. Without the guarantee of anonymity, certain posters will never share information and the public will be less informed.

Newspapers today seek to do more than just report the news. They have traditionally allowed for outside comment on "op-ed" pages and more varied reader comments in "letters to the editor" columns. The intent has always been to engage the community in the discussion of public affairs. But news organizations

that allow anonymous comments on their sites are unable to litigate those speakers' interests anytime an aggrieved party wishes to sue over unflattering or controversial comments. Thus the *Dendrite*/*Cahill* notice and heightened pleading requirements are essential to allowing a discussion forum to flourish while also allowing for speakers to protect their own rights. Ultimately, it is the public discourse that will benefit if this court adopts the heightened standards.

CONCLUSION

This Court should reverse the trial court's order that Yelp comply with the subpoena *duces tecum* and produce the information identifying the defendants.

Respectfully submitted,

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WORD-COUNT CERTIFICATE

I hereby certify that my word processing program, Microsoft Word, counted 3,869 words in this brief, not counting the cover, tables, and certifications.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of May, 2013, I caused this brief to be served by FedEx on the following:

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