ILLINOIS APPELLATE COURT FOR THE
THIRD DISTRICT
NO. 03-08-0805

DONALD MAXON, JANET MAXON, Petitioner-Appellants, v. OTTAWA PUBLISHING COMPANY, A Delaware Limited Liability Company, Respondent-Appellee.	))))))))))	Appeal from Thirteenth Judicial Circuit, LaSalle County Case No. 2008-MR-125 Honorable Eugene P. Daugherity Presiding

BRIEF OF *AMICI CURIAE* CITIZEN MEDIA LAW PROJECT, GANNETT CO., INC., HEARST CORPORATION, ILLINOIS PRESS ASSOCIATION, ONLINE NEWS ASSOCIATION, ONLINE PUBLISHERS ASSOCIATION, PUBLIC CITIZEN, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AND TRIBUNE COMPANY

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POINTS AND AUTHORITIES

STATEMENT OF INTEREST

Citizen Media Law Project, Gannett Co., Inc., Hearst Corporation, Illinois Press Association, Online News Association, Online Publishers Association, Public Citizen, Reporters Committee for Freedom of the Press, and Tribune Company (collectively "*Amici*") include media organizations, related professional and trade associations, and advocacy groups located in Illinois and throughout the United States. In diverse ways, *Amici* publish on the Internet and seek to protect the free flow of information to the public.

As described more fully in the accompanying motion for leave to file this brief, *Amici* share the concern that, if the Court does not affirm the procedural safeguards necessary to protect the First Amendment rights of anonymous speakers online, the public's access to news and information will be irreparably harmed. *Amici* take no position on the merits of Petitioner-Appellants' underlying defamation claim. Instead, *Amici* file this brief to urge the Court to join the growing consensus among state and federal courts requiring would-be plaintiffs to provide notice and make a substantial legal and factual showing of the merits of their claim before ordering the disclosure of an anonymous speaker's identifying information, as the court below required.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This appeal presents an issue of first impression in Illinois, marking the first appellate encounter with the standard Illinois courts should apply to evaluate civil discovery requests seeking the identity of an anonymous speaker on the Internet. The case involves a petition for pre-suit discovery seeking the identity of anonymous commenters on *www.mywebtimes.com*, the website for *The Times*, a local newspaper in

Ottawa, Illinois published by Ottawa Publishing Company. On July 31, 2008, the Petitioners, Donald and Janet Maxon, served Ottawa Publishing Company with a Petition for Discovery Before Suit seeking the identities of anonymous commenters who allegedly had posted defamatory statements about the Maxons on *www.mywebtimes.com*. Ottawa Publishing Company opposed the request. In an oral opinion on October 2, 2008, the trial court dismissed the Maxons' petition, applying the test for protecting anonymous speech articulated in *Dendrite International v. Doe*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001), and finding that the statements at issue were non-defamatory statements of opinion. *See* Petitioner-Appellants' Appendix ("App."), A92-A107.

Like the trial court, this Court should follow the strong consensus that is emerging among federal and state courts in other jurisdictions that would-be plaintiffs must provide notice and make a substantial legal and factual showing of the merits of the underlying claim before ordering the unmasking of an anonymous or pseudonymous Internet speaker. Applying these procedural safeguards strikes the appropriate balance between the Internet speaker's First Amendment right to engage in anonymous speech and the would-be plaintiff's right to seek proper redress for legally actionable harm.

The First Amendment protects anonymous speech. The United States Supreme Court has long recognized the importance of anonymous speech both to our nation's history and to uninhibited, robust, and wide-open public discourse. Engaging in anonymous speech enables individuals and groups to express controversial or unpopular views without fear of ostracism or retaliation, and it allows the famous or infamous to be judged on the content of their ideas rather than on their identities. The same First Amendment rights extend to the Internet, where the low cost of publication has made it

possible for every citizen with Internet access to become an independent publisher. As media and nonprofit organizations operating online, *Amici* recognize the value of anonymous speech to informing the public and creating vibrant communities of readers and website users discussing articles, newsworthy events, and public affairs. *Amici* are concerned that, should the courts deprive Internet speakers of their anonymity without appropriate safeguards, the uninhibited and robust exchange of ideas that has sprung up on news websites will be chilled.

Of course, the right to anonymous speech is not absolute. The question is how to appropriately balance the anonymous speaker's First Amendment rights against the would-be plaintiff's right to legal redress when warranted. While courts that have considered the issue have struck the balance in slightly different ways, nearly all of them, including the lower court here, agree on three requirements: the plaintiff must (1) undertake reasonable efforts to notify the anonymous speaker of the request for disclosure and withhold action to allow the speaker an opportunity to respond; (2) establish that the underlying cause of action can withstand a motion to dismiss; and (3) produce sufficient evidence supporting each element of its cause of action on a *prima facie* basis. Some courts have also engaged in a balancing of the equities, taking into account factors such as the irreparable harm to the speaker from disclosure and the strength of the plaintiff's need for the information.

Amici respectfully submit that this Court should adopt a standard requiring the same or similar procedural safeguards. By doing so, the Court will protect the important First Amendment values furthered by anonymous speech and ensure that a speaker's First

Amendment rights will yield only when necessary to pursue a viable legal claim, not to harass or intimidate the speaker or stifle protected speech.

ARGUMENT

A pre-suit discovery request seeking to reveal the identity of an anonymous Internet speaker implicates important First Amendment concerns, requiring a court to balance the rights of the speaker against the rights of the would-be plaintiff. In keeping with the Supreme Court's long tradition of protecting anonymous speech and ensuring the free flow of information to the public, this Court should adopt procedural safeguards that adequately protect the First Amendment right to engage in anonymous speech, while allowing plaintiffs to pursue viable legal claims.

I. THE FIRST AMENDMENT PROTECTS AGAINST COMPELLED IDENTIFICATION OF ANONYMOUS SPEAKERS.

The United States Supreme Court has repeatedly affirmed that the First Amendment protects the right to speak anonymously. *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182 (1999) (invalidating a Colorado statute that required initiative petition circulators to wear identification badges); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) (overturning an Ohio statute prohibiting distribution of anonymous campaign literature); *Talley v. California*, 362 U.S. 60 (1960) (overturning a municipal ordinance forbidding the distribution of unsigned handbills). As a result, the Supreme Court has subjected government restraints on anonymous speech to strict scrutiny, striking them down when not narrowly tailored to a compelling government interest. *See Watchtower Bible & Tract Soc'y v. Vill. of Stratton*, 536 U.S. 150, 166-69 (2002); *Buckley*, 525 U.S. at 199-200; *McIntyre*, 514 U.S. at 347; *Talley*, 362 U.S. at 66-67 (Harlan, J., concurring); *see also NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449,

463-66 (1958) (due process requires a showing of a compelling interest where court-ordered disclosure of identity threatens fundamental rights).

The Illinois Supreme Court has similarly held that restrictions on anonymous speech are unconstitutional under both the federal and state constitutions when not narrowly tailored to a compelling government interest. *See People v. White*, 116 Ill. 2d 171, 506 N.E. 2d 1284 (1987) (invalidating statute prohibiting distribution of political literature without the name and address of the publisher and distributor). In fact, the Illinois Constitution is more protective of free speech than the Federal Constitution. *See* Ill. Const. art. I, § 4; *People v. DiGuida*, 152 Ill. 2d 104, 122, 604 N.E. 2d 336, 344 (1992).

In upholding the right to speak anonymously, the United States Supreme Court has honored the long tradition of anonymous speech in our nation's public discourse. In *McIntyre v. Ohio Elections Commission*, the Court explained the importance of anonymous speech:

> Anonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation — and their ideas from suppression — at the hand of an intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse.

McIntyre, 514 U.S. at 357 (citation omitted). The Court has detailed a history rife with examples of anonymous pamphleteering in favor of political causes, from "Junius" to "Cincinnatus" to "Federal Farmer" to "Philadelphiensis." *See McIntyre*, 514 U.S. at 342-43 & n.6; *McIntyre*, 514 U.S. at 360-67 (Thomas, J., concurring); *Talley*, 362 U.S. at 64-65. Most famously, James Madison, Alexander Hamilton, and John Jay published *The*

Federalist Papers under the pseudonym "Publius" to focus attention on the merits of their arguments in favor of ratification of the Constitution and away from their status as prominent Federalists. *See Talley*, 32 U.S. at 64-65; *McIntyre*, 514 U.S. at 342-43 & n.6.

The Supreme Court has identified two primary motivations for engaging in this "honorable tradition of advocacy and of dissent." *McIntyre*, 514 U.S. at 357. First, speakers may choose anonymity to avoid persecution or retaliation for their speech. As the Court explained in *McIntyre*, the decision to speak anonymously 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." *McIntyre*, 514 U.S. at 341-42; *see also Talley*, 362 U.S. at 64 ("Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all."). Second, engaging in anonymous speech allows speakers to avoid having their views stereotyped according to race, ethnicity, gender, class, or personal notoriety. *See McIntyre*, 514 U.S. at 342 ("Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent.").

Without the protective veil of anonymity, fear of retaliation and embarrassment, as well as disillusionment over prejudice, might well chill many speakers from engaging in public discourse at all. For this reason, the Court has been quick to invalidate government encroachments on the right to speak anonymously. *See McIntyre*, 514 U.S. at 342 ("[T]he interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of

entry."); *Talley*, 362 U.S. at 65 (invalidating ordinance because "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance").

As the Supreme Court has recognized, First Amendment protections extend to speech on the Internet. *Reno v. ACLU*, 521 U.S. 844, 868-70 (1997); *see also Sinclair v. TubeSockTedD*, No. 08-0434, 2009 WL 320408, at *2 (D.D.C. Feb. 10, 2009); *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001); *Doe v. Cahill*, 884 A.2d 451, 456 (Del. 2005); *Krinksy v. Doe 6*, 72 Cal. Rptr. 3d 231, 239 (Cal. Ct. App. 2008). Indeed, the rationale for protecting anonymous speech applies with equal — if not greater — force to speech on the Internet. Because of the low costs associated with creating and distributing content online, the Internet has opened up the channels of publication to ordinary individuals with limited financial resources, creating a veritable explosion of different viewpoints on topics "as diverse as human thought." *Reno*, 521 U.S. at 852. This proliferation of voices has created a vibrant new marketplace of ideas and unparalleled opportunities for uninhibited, robust, and wide-open public discourse. *See Reno*, 521 U.S. at 870 ("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 . . . and newsgroups, the same individual can become a pamphleteer"); Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 Duke L.J. 855, 860-61, 897-98 (2000) (noting the Internet's potential to "giv[e] voice to the disenfranchised and . . . allow[] more democratic participation in public discourse" and to "mak[e] public discourse richer and more nuanced").

Anonymous speech enables individuals to contribute to this vibrant online discourse without fear of retaliation or embarrassment, making it more likely for marginal voices to contribute and facilitating richer and more diverse points of view. As one court put it, the ability to speak anonymously and pseudonymously on the Internet "offers a safe outlet for the user to experiment with novel ideas, express unorthodox political views, or criticize corporate or individual behavior without fear of intimidation or reprisal." *Krinsky*, 72 Cal. Rptr. 3d at 237.

The right to speak anonymously would be largely hollow, however, if would-be plaintiffs could simply dash off a subpoena and force disclosure of an anonymous speaker's identity. Without significant procedural protections in the civil discovery context, the legitimate exercise of First Amendment rights will be chilled. *See 2TheMart.com*, 140 F. Supp. 2d at 1093 ("If Internet users could be stripped of that anonymity by 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."); *Quixtar Inc. v. Signature Mgmt. Team*, 566 F. Supp. 2d 1205, 1214 (D. Nev. 2008) ("To fail to protect anonymity is, therefore to chill speech."); *Cahill*, 884 A.2d at 457 ("The possibility of losing anonymity in a future lawsuit could intimidate anonymous posters into self-censoring their comments or not commenting at all."); *cf. New York Times v. Sullivan*, 376 U.S. 254, 279 (1964) (expressing fear that "would-be critics of official conduct may be deterred from voicing their criticisms, even though it is believed to be true and even though it is in fact true" because of the risk of a libel suit).

The potential chilling effect from civil subpoenas and pre-suit discovery actions like this one is especially worrisome to *Amici* given evidence suggesting that plaintiffs often pursue these measures simply to unmask their critics and take extra-judicial action, rather than to obtain redress for legally actionable speech. *See, e.g.*, *Swiger v. Allegheny Energy*, No. 05-5725-JCJ, 2007 WL 442383 (E.D. Pa. Feb. 7, 2007) (company subpoenaed poster's identifying information, dismissed lawsuit, and fired the employee); Jay Eisenhofer & Sidney S. Liebesman, *Caught by the Net: What To Do If a Message Board Messes with Your Message*, 10 Bus. Law Today 40, 46 (Sept./Oct. 2000) (encouraging companies to bring suit, even if they do not intend to pursue the action to a conclusion, because "[t]he mere filing of the John Doe action will probably slow the postings"); *see also Cahill*, 884 A.2d at 457 ("After obtaining the identity of an anonymous critic through the compulsory discovery process, a defamation plaintiff who either loses on the merits of fails to pursue a lawsuit is still free to engage in extra-judicial self-help remedies . . . ."). This Court can help avoid the misuse of the legal process in this way by imposing strong procedural safeguards for Illinois courts to follow before ordering the identification of an anonymous or pseudonymous speaker.

Amici, as organizations devoted to the free flow of information, have an especially acute interest in avoiding the potential chilling effect on anonymous speech. While newspapers have always sought to engage the community and elicit outside comment through "letters to the editor" and similar columns, media organizations now have a strong business interest in encouraging interactive online communities where readers can express their views on newsworthy events and public issues. Reader interest in news websites hinges not only on the quality of journalism published there (which remains

important), but also on the community conversations that develop around stories and opinion pieces.

If the courts fail to adequately protect anonymous speech, the chilling effect could easily "compromise the vitality of the newspaper's online forums, sparking reduced reader interest and a corresponding decline in advertising revenues." *Enterline v. Pocono Med. Ctr.*, No. 3:08-cv-1934, 2008 WL 5192386, at *3 (M.D. Pa. Dec. 11, 2008); *see also In re Verizon Internet Servs.*, 257 F. Supp. 2d 244, 258 (D.D.C. 2003) (allowing an ISP to assert the rights of anonymous subscribers in part because "a failure to do so could affect [its] ability to maintain and broaden its client base"), *rev'd on other grounds, RIAA v. Verizon Internet Servs.*, 351 F.3d 1229 (D.D.C. 2003).

II. THE FIRST AMENDMENT REQUIRES COURTS TO APPLY STRONG PROCEDURAL SAFEGUARDS BEFORE ORDERING THE DISCLOSURE OF AN INTERNET SPEAKER'S IDENTITY.

Because discovery requests like this one seeking the identities of anonymous speakers implicate First Amendment rights, courts should take steps to ensure that those rights are not infringed unnecessarily. An appropriate judicial standard will protect anonymous speech while also taking into account the interests of those who have suffered legally actionable harm. Courts in other jurisdictions consistently have required would-be plaintiffs to meet heightened procedural requirements before unmasking an Internet speaker. Nearly all of these courts agree on three requirements: the plaintiff must (1) undertake reasonable efforts to notify the anonymous speaker of the request for disclosure and withhold action to allow the speaker an opportunity to respond; (2) establish that the underlying cause of action can withstand a motion to dismiss; and (3) produce sufficient evidence supporting each element of its cause of action on a *prima facie* basis. In addition, some courts also require a further balancing of the equities

before ordering disclosure. *Amici* respectfully submit that this Court should follow this strong and growing consensus and apply a similar set of procedural safeguards to protect the right to speak anonymously and to avoid unnecessarily chilling speech.

A. This Court should adopt a standard that strikes an appropriate balance between the First Amendment right to speak anonymously and the right to bring suit for legally cognizable harm.

The First Amendment right to speak anonymously is not absolute. It cannot act as a shield for defamatory or other tortious speech. For that reason, nearly every court asked to order the unmasking of an anonymous speaker has recognized that the proper inquiry is how to balance the Internet speaker's First Amendment right to engage in anonymous speech against the would-be plaintiff's right to recover for legally actionable speech. *See, e.g.*, *Indep. Newspapers, Inc. v. Brodie*, No. 63, 2009 WL 484956, at *1 (Md. Feb. 27, 2009); *Doe v. Cahill*, 884 A.2d 451, 456 (Del. 2005); *Dendrite Intern. v. Doe*, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001); *Quixtar Inc. v. Signature Mgmt. Team*, 566 F. Supp. 2d 1205, 1211 (D. Nev., 2008). In striking this balance, courts have paid special attention to ensuring that "the First Amendment rights of anonymous Internet speakers are not lost unnecessarily, and that plaintiffs do not use discovery to 'harass, intimidate or silence critics in the public forum opportunities presented by the Internet.'" *Doe I v. Individuals*, 561 F. Supp. 2d. 249, 254 (D. Conn. 2008) (quoting *Dendrite*, 775 A.2d at 771).

B. Courts in other jurisdictions have consistently required plaintiffs seeking the identity of an anonymous Internet speaker to provide notice to the speaker and to make a legal and factual showing that their claims have merit before obtaining discovery.

In recent years, federal and state courts in other jurisdictions have consistently required plaintiffs seeking the identity of an anonymous Internet speaker to satisfy strong

procedural safeguards, requiring them to provide notice to the anonymous speaker and a meaningful opportunity to respond, as well as to make a legal and factual showing that their claims have merit. *See, e.g.*, *Brodie*, 2009 WL 484956, at *20; *Cahill*, 884 A.2d at 460-61; *Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231, 241-46 (Cal. Ct. App. 2008); *Mobilisa, Inc. v. Doe*, 170 P.3d 712, 719-21 (Ariz. Ct. App. 2007); *Dendrite*, 775 A.2d at 760-61; *Doe I*, 561 F. Supp. 2d at 254-56. Some courts also have added an extra layer of protection, explicitly balancing the strength of the anonymous speaker's First Amendment interest against the strength of the would-be plaintiff's case and the need for disclosure. *See Brodie*, 2009 WL 484956, at *20; *Mobilisa*, 170 P.3d at 720; *Dendrite*, 775 A.2d at 761; *Highfields Capital Mgmt. v. Doe*, 385 F. Supp. 2d 969, 970-71, 976 (N.D. Cal. 2005).

For example, the leading case of *Dendrite International v. Doe*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001), involved a "John Doe" lawsuit alleging that a number of pseudonymous commenters on a Yahoo! message board had defamed Dendrite International, Inc., a company that provided custom computer programming for the pharmaceutical industry. *See* 775 A.2d at 759. The trial court denied Dendrite's motion for expedited discovery to uncover the identity of one of the posters. *Dendrite*, 775 A.2d at 759. On interlocutory appeal, the Superior Court of New Jersey, Appellate Division, affirmed the trial court's ruling, holding that Dendrite had failed to demonstrate that its underlying claims had merit and thus could not overcome the John Doe defendant's First Amendment right to speak anonymously. *Dendrite*, 775 A.2d at 771-72. The Appellate Division explained:

> People are permitted to interact pseudonymously and anonymously with each other so long as those acts are not in violation of the law. 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. Furthermore, it permits persons to obtain information relevant to a sensitive or intimate condition without fear of embarrassment. 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.

Dendrite, 775 A.2d at 765 (quoting *Columbia Ins. Co. v. seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999)).

The Appellate Division instructed lower courts to impose the following procedural safeguards before unmasking an anonymous speaker: (1) the plaintiff must undertake reasonable efforts to notify the anonymous posters that they are the subject of a subpoena seeking their identity; (2) the plaintiff must specify the exact statement alleged to constitute actionable speech; (3) the court must evaluate whether the complaint states a viable legal claim against the anonymous defendants; (4) the plaintiff must produce sufficient evidence supporting each element of its claims on a *prima facie* basis; and (5) the court must then balance the defendant's First Amendment right of anonymous speech against the strength of the plaintiff's *prima facie* case and the need for disclosure of the anonymous defendant's identity. *Dendrite*, 775 A.2d at 760-61. Applying this standard, the Appellate Division determined that the trial court had correctly denied Dendrite's discovery request because it failed to come forward with *prima facie* evidence of reputational harm. *Dendrite*, 775 A.2d at 771-72.

The Delaware Supreme Court applied a slightly less exacting standard in *Doe v. Cahill*, 884 A.2d 451 (Del. 2005). In *Cahill*, a town councilman filed a John Doe lawsuit after an anonymous poster using the pseudonym "Proud Citizen" posted critical comments about him on a local blog. The councilman sought to compel the poster's Internet Service Provider to turn over identifying information, and the anonymous poster

moved the court for a protective order. The trial court denied the motion for a protective order, finding that the councilman had brought the action in "good faith." On interlocutory appeal, the Supreme Court of Delaware reversed the trial court and remanded with instructions to dismiss the complaint with prejudice, explaining that the trial court had applied a standard "insufficiently protective of Doe's First Amendment right to speak anonymously." *Cahill*, 884 A.2d at 454.

The *Cahill* court determined that the proper standard would require a party seeking to unmask an anonymous Internet speaker to do two things: (1) undertake efforts to provide notice to the anonymous poster and withhold action to allow a reasonable opportunity to respond; and (2) support his or her defamation claim with facts sufficient to defeat a hypothetical motion for summary judgment. *See Cahill*, 884 A.2d at 460-61. The *Cahill* court viewed its "summary judgment" standard as virtually identical to the requirement imposed by the New Jersey Appellate Division in *Dendrite* that a plaintiff produce evidence to support each element of its claim on a *prima facie* basis. *See Cahill*, 884 A.2d at 461, 463. Under both standards, a party seeking discovery must produce evidence sufficient to create a jury issue with respect to its underlying claim; it need not at this stage produce evidence sufficient to prevail as a matter of law. *Compare Cahill*, 884 A.2d at 463 (explaining that, to obtain discovery, a plaintiff "must introduce evidence creating a genuine issue of material fact for all element of a defamation claim within the plaintiff's control"), *with Dendrite*, 775 A.2d at 772 (no *prima facie* showing when plaintiff introduced no competent evidence to show reputational harm).

Otherwise, the Delaware Supreme Court viewed its standard as a modification of the *Dendrite* test. It explained that the second and third *Dendrite* requirements —

identification of the specific allegedly defamatory statements and survival of a motion to dismiss — were incorporated into its summary judgment inquiry because a plaintiff could not survive such a motion if he/she failed to identify specific actionable statements. *See Cahill*, 884 A.2d at 461. Similarly, the court found that the final *Dendrite* requirement — balancing the speaker's and plaintiff's respective interests — was "unnecessary" because the summary judgment inquiry itself provided the correct balance. *Cahill*, 884 A.2d at 461. Applying its standard, the *Cahill* court ruled that the plaintiff was not entitled to unmask the John Doe defendant because the allegedly defamatory statements were incapable of defamatory meaning, and therefore the councilman could not make out a *prima facie* case of defamation, as necessary to overcome a motion for summary judgment. *Cahill*, 884 A.2d at 467.

In the most recent case to consider the issue, the Maryland Court of Appeals less than a month ago applied the *Dendrite* standard to a subpoena seeking the identity of anonymous commenters who had posted comments to a news website regarding the cleanliness of the plaintiff's Dunkin Donuts franchise. *Brodie*, 2009 WL 484956, at *19. The trial court denied the newspaper's motion to quash and ordered compliance with the subpoena. *Brodie*, 2009 WL 484956, at *19. The Court of Appeals reversed the trial court, holding that the plaintiff had not pled a viable defamation claim against any of the anonymous posters. *Brodie*, 2009 WL 484956, at *11. The Court of Appeals applied the *Dendrite* standard, indicating that it "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*, 2009 WL 484956, at *19.[1] The Court of

[1] In *Brodie*, the Maryland Court of Appeals appears to have misread *Cahill* as requiring a plaintiff to produce evidence sufficient to *win* a motion for summary judgment, rather than requiring a plaintiff to

Appeals explained that applying a lower threshold "would inhibit the use of the Internet as a marketplace of ideas." *Brodie*, 2009 WL 484956, at *19.

Like *Brodie*, nearly every case to address the issue in recent years has adopted either the *Dendrite* or the *Cahill* standard, rejecting the lesser "motion to dismiss" and "good faith" standards adopted by some early courts as insufficiently protective of speakers' First Amendment rights. *See, e.g.*, *Sinclair v. TubeSockTedD*, No. 08-0434, 2009 WL 320408, at *2-3 (D.D.C. Feb. 10, 2009) (finding discovery improper under either *Cahill* or *Dendrite*); *Doe I*, 561 F. Supp. 2d at 256 (following *Dendrite*); *Quixtar*, 566 F. Supp. 2d at 1216 (following *Cahill*); *Best Western Intern., Inc. v. Doe*, No. CV-06-1537, 2006 WL 2091695, at *4-5 (D. Ariz. July 25, 2006) (following *Dendrite*); *McMann v. Doe*, 460 F. Supp. 2d 259, 268 (D. Mass. 2006) (following *Cahill*); *Highfields Capital Mgmt.*, 385 F. Supp. 2d at 970-71, 975-76 (following *Dendrite*); *Krinsky*, 72 Cal. Rptr. 3d at 244-46 (fashioning a hybrid of *Cahill* and *Dendrite*); *Mobilisa*, 170 P.3d at 720 (following *Dendrite*); *In re Does 1-10*, 242 S.W.3d 805, 821-23 (Tex. Ct. App. 2007) (following *Cahill*); *Reunion Indus. v. Doe 1*, 80 Pa. D. & C. 4th 449, 455-56 (Pa. D. & C. 2007) (following *Cahill*). In the case at bar, the trial court also recognized the earlier, less stringent standards as insufficient, stating that the "good faith" standard "leaves the person who's protected by the First Amendment completely and totally exposed at the discretion of someone bringing a lawsuit." App. at A94

Looking past the terminology used, one can distill from these cases three requirements that the courts consistently apply before ordering the disclosure of an anonymous Internet speaker's identity: notice and meaningful opportunity to respond,

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produce evidence sufficient to *defeat* a hypothetical motion for summary judgment. *Compare Brodie*, 2009 WL 484956, at *20, *with Cahill*, 884 A.2d at 460-61, 63.

legal claims that can survive a motion to dismiss, and evidentiary support sufficient to create a jury issue on each element of the plaintiff's claim. A number of courts have further engaged in *Dendrite*'s balancing of the equities, weighing the strength of the speaker's First Amendment interests against the strength of the would-be plaintiff's *prima facie* case and the need for disclosure on a case-by-case basis. Regardless of the semantic differences, these cases all recognize that a would-be plaintiff must give the court compelling reasons to deprive an Internet speaker of his or her constitutionally protected right to speak anonymously. At the very least, this requires a party seeking discovery to provide notice and demonstrate that their claims have legal and factual merit sufficient to ensure that their need for disclosure outweighs the speaker's First Amendment right to speak anonymously.

C. A four-part standard synthesized from the cases strikes the appropriate balance between the right to speak anonymously and the right to bring suit for actionable speech.

Amici respectfully submit that the following four-part standard, synthesized from the case law, provides the strong procedural safeguards necessary to appropriately balance an Internet speaker's First Amendment right to engage in anonymous speech against a would-be plaintiff's right to recover for legally actionable speech. Under the proposed standard, a court should require the following things before ordering the unmasking of an anonymous speaker: (1) The plaintiff must undertake reasonable efforts to notify the anonymous speaker of the request for disclosure and withhold action to allow the speaker a meaningful opportunity to respond; (2) the allegations in the complaint must state a viable cause of action; (3) the plaintiff must present sufficient evidence to support each element of its claim on a *prima facie* basis; and (4) the equities

must weigh in favor of disclosure. These requirements, which are consistent with the lower court's adoption of the *Dendrite* standard, are explained in more detail below.

1. The plaintiff should undertake reasonable efforts to notify the anonymous speaker and withhold action to allow the speaker a meaningful opportunity to respond.

The party seeking to unmask an anonymous Internet speaker should be required to take reasonable steps to notify the anonymous Internet speaker of the request for disclosure and withhold action to allow the speaker a meaningful opportunity to respond. *See Brodie*, 2009 WL 484956, at *14 ("The requirement of notification to the poster, coupled with opportunity to defend appears to be generally accepted in First Amendment cases . . . ."); *see also Cahill*, 884 A.2d at 460-61; *Krinsky*, 72 Cal. Rptr. 3d at 244; *Mobilisa,* 170 P. 3d at 719; *Dendrite*, 775 A.2d at 760; *Doe I*, 561 F. Supp. 2d at 254. This requirement ensures that the discovery process comports with the basic tenets of due process and ensures that the anonymous speaker has the ability to assert his or her First Amendment rights.

Usually, the burden should fall on the plaintiff to make reasonable efforts to notify the anonymous speaker, for example, by posting notice of its request for discovery at the online location where the challenged statements appeared. *See Cahill*, 884 A.2d at 461; *Mobilisa*, 170 P.3d at 719-20; *Dendrite*, 775 A.2d at 760; *Doe I*, 561 F. Supp. 2d at 254. But, often the party from whom discovery is sought has access to the speaker's email address or other identifying information and may even be required to notify the speaker of subpoenas or other requests for identifying information by its terms of service. In these instances, notice provided by the website operator or Internet Service Provider may suffice. *See Krinsky*, 72 Cal. Rptr. 3d at 244 ("[W]hen ISPs and message-board

sponsors . . . themselves notify the defendant that disclosure of his or her identity is sought, notification by the plaintiff should not be necessary."); *Mobilisa*, 170 P.3d at 720.

But, steps taken to give notice — whether by a would-be plaintiff, a website operator, or an Internet Service Provider — are not always effective. An Internet user may never return to a website where comments were posted; an email address previously provided may expire or be abandoned; spam filters may intercept messages from unfamiliar senders. Because of these and other obstacles, a court should not conclude that an Internet speaker has waived his or her rights simply because the speaker does not appear. *Cf. Brodie*, 2009 WL 484956, at *12-13 (ordering lower court to quash subpoena challenged by newspaper even though anonymous speakers did not come forward).

2. The court must satisfy itself that the allegations in the complaint state a viable cause of action.

Before ordering the disclosure of a speaker's identity, a court should require a plaintiff to set forth the specific allegedly actionable statements and demonstrate that each could support a viable cause of action. *See, e.g.*, *Brodie*, 2009 WL 484956, at *11-13, 20; *Cahill*, 884 A.2d at 461; *Krinsky*, 72 Cal. Rptr. 3d at 245, 247-50; *Dendrite*, 775 A.2d at 760; *Greenbaum v. Google*, 845 N.Y.S.2d 695, 698-701 (N.Y. Sup. Ct. 2007); *Doe I*, 561 F. Supp. 2d at 254. If a plaintiff cannot put forth a legally sufficient claim that would survive a motion to dismiss, unmasking the identity of an anonymous speaker would violate the speaker's First Amendment rights because if the speaker's "'statements are lawful, they would be afforded Constitutional protection.'" *Brodie*, 2009 WL 484956, at *16 (quoting *Dendrite*, 775 A.2d at 760, 766). The Arizona Court of Appeals has noted that "this step furthers the goal of compelling identification of anonymous

Internet speakers only as a means to redress legitimate misuses of speech rather than as a means to retaliate against or chill legitimate uses of speech." *Mobilisa*, 170 P.3d at 720.

3. Plaintiff must present sufficient evidence to support each element of its claim on a *prima facie* basis.

Before ordering the disclosure of a speaker's identity, a court should require a plaintiff to produce sufficient evidence for each claim showing that he/she has a reasonable chance of prevailing in a lawsuit against each anonymous defendant. This requirement is necessary to prevent plaintiffs from unmasking critics simply by filing a facially adequate but factually unsubstantiated complaint. *See Cahill*, 884 A.2d at 459 (explaining that heightened standard is necessary because "even silly or trivial libel claims can easily survive a motion to dismiss where the plaintiff pleads facts that put the defendant on notice of his claim, however vague or lacking in detail these allegations may be"); *Doe I*, 561 F. Supp. 2d at 255 (explaining that lower standards "set the threshold for disclosure too low to adequately protect the First Amendment rights of anonymous defendants").

Most courts have followed *Dendrite*'s formulation of this requirement, requiring the party seeking discovery to "produce sufficient evidence supporting each element of its cause of action, on a prima facie basis, prior to a court ordering the disclosure of the identity of the unnamed defendant." *Dendrite*, 775 A.2d at 760; *Doe I*, 561 F. Supp. 2d at 256; *Highfields Capital Mgmt.*, 385 F. Supp. 2d at 97677; *Krinsky*, 72 Cal. Rptr. 3d at 245; *see also Sinclair*, 2009 WL 320408, at *2-*3 (explaining that both *Dendrite* and *Cahill* "require[] the plaintiff to come forward with sufficient evidence to establish a prima facie case on all elements of a claim that are supportable without discovery").

This step, along with the requirement that the party seeking discovery plead a viable cause of action, provides a crucial safeguard against plaintiffs who claim they need the poster's identity to proceed with a lawsuit, but in reality only wish to know the identity of the poster with no intention to proceed further. As noted in Part I above, evidence suggests that plaintiffs often seek the identity of anonymous posters for reasons other than pursuing a viable cause of action. As the *Cahill* court explained, "[t]his 'sue first, ask questions later' approach, coupled with a standard only minimally protective of the anonymity of defendants, 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." 884 A.2d at 457. Requiring at least a *prima facie* showing "ensures that the plaintiff is not merely seeking to harass or embarrass the speaker or stifle legitimate criticism." *Krinsky*, 72 Cal. Rptr. 3d at 245; *see also Doe I*, 561 F. Supp. 2d at 256; *Mobilisa*, 170 P.3d at 720.

Requiring a plaintiff to make a well-supported factual showing does not add significantly to the party's substantive burden, but simply advances the timeframe for the showing the plaintiff would be required to make to get to trial. Indeed, the facts necessary to establish most elements of a defamation claim are typically within the plaintiff's control, not within the control of the anonymous speaker.

Courts in some jurisdictions have been sensitive to the difficulty plaintiffs may face in establishing "actual malice" at an early stage of a lawsuit, and therefore have loosened the evidentiary requirement so that plaintiffs need only produce *prima facie* evidence only for those elements reasonably within their control. *See, e.g.*, *Mobilisa*, 170 P.3d at 720 (requiring plaintiff to present evidence "on all of the elements within the

requesting party's control – in other words, all elements not dependent upon knowing the identity of the anonymous speaker"); *Krinsky*, 72 Cal. Rptr. 3d at 245 n.12 (explaining that "[c]ourts have obviated [the difficulty of establishing certain elements of a claim without knowing the identity of the poster] by insisting on a preliminary showing of only those facts accessible to the plaintiff"); *Cahill*, 884 A.2d at 464 (explaining that "[w]e do NOT hold that the public figure defamation plaintiff is required to produce evidence [of actual malice]"). Tempered in this way, this strong evidentiary requirement will not prevent plaintiffs with viable claims from getting relief in the courts, but will prevent claims by those who would misuse the legal system to harass and silence legitimate critics.

4. The court should balance the equities, weighing the strength of the anonymous speaker's First Amendment interests against the strength of the plaintiff's claim and the need for disclosure.

While in many cases a showing of a legally and factually sufficient claim will tip the balance in favor of the party seeking discovery, *Amici* respectfully submit that those decisions that have further required a balancing of the equities more adequately protect the right to speak anonymously. In performing this step, a court should:

> 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. The application of these procedures and standards must be undertaken and analyzed on a case-by-case basis. The guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue.

Dendrite, 775 A.2d at 760-761; *see also Brodie*, 2009 WL 484956, at *20; *Mobilisa*, 170 P.3d at 720; *Highfields Capital Mgmt.*, 385 F. Supp. 2d at 976. This balancing test should include consideration of "the type of speech involved, the speaker's expectation of privacy, the potential consequence of a discovery order to the speaker and others

similarly situated, the need for the identity of the speaker to advance the requesting party's position, and the availability of alternative discovery methods." *Mobilisa*, 170 P. 3d at 720.

Balancing the equities in this fashion gives a court greater flexibility to determine whether unmasking is appropriate on case-by-case basis, and thus can better ensure that the plaintiff does not force the disclosure of an anonymous speaker's identity when disclosure is unnecessary for relief or when disclosure is especially likely to result in harmful extra-judicial action. For instance, disclosure of a speaker's identity might not be warranted, despite a sufficient legal and factual showing, when a court has reason to believe that physical retaliation or termination from employment might result.

This extra protection also reflects the fact that an order for compelled disclosure may result in irreparable harm, similar to an order for a preliminary injunction, a context in which courts routinely apply a balancing of the equities in addition to considering the likelihood of success on the merits. Once a court orders compelled identification, the disclosure cannot be undone, and the aggrieved speaker is left virtually without remedy for the harm done to his or her First Amendment rights. *See Mobilisa*, 170 P.3d at 721 (explaining that disclosure threatens even greater irreparable harm than an injunction because "an unmasked anonymous speaker cannot later obtain relief from the order should the party seeking the speaker's identity not prevail on the merits of the lawsuit"). In contrast, denial of a discovery request does not leave the requesting party without options. The would-be plaintiff is free to renew the request after submitting evidence to bolster the *prima facie* case or demonstrating more compelling need.

CONCLUSION

Anonymous speech is vital to encouraging interactive online communities where participants can express their views on newsworthy events and public issues. In order to ensure that the right to speak anonymously is protected, *Amici* respectfully request that the Court implement the procedural safeguards outlined above in deciding whether to affirm or reverse the decision below.

Dated: March 24, 2009

Respectfully submitted,

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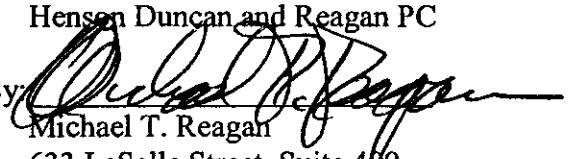
By: 
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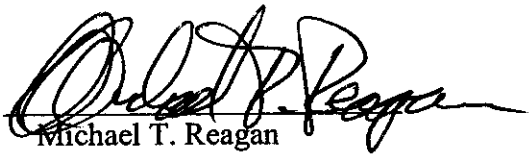
CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 24 pages.

By: 

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NOTICE OF FILING AND CERTIFICATE OF SERVICE

I, Michael T. Reagan, an attorney, hereby certify that on March 24, 2009, I caused to be filed with the Clerk of the Third District Appellate Court the foregoing BRIEF OF AMICI CURIAE CITIZEN MEDIA LAW PROJECT, GANNETT CO., INC., HEARST CORPORATION, ILLINOIS PRESS ASSOCIATION, ONLINE NEWS ASSOCIATION, ONLINE PUBLISHERS ASSOCIATION, PUBLIC CITIZEN, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AND TRIBUNE COMPANY. I further certify that I caused three copies of the foregoing Brief of *Amici Curiae* to be mailed to the following attorneys at the following addresses, via United States mail, postage prepaid, on March 24, 2009.

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