FILED UNDER THE ELECTRONIC BRIEFING RULES

SUPREME COURT

OF THE

STATE OF CONNECTICUT

Hartford Judicial District
S.C. 20699

VINCENT G. BENVENUTO

v.

KEVIN BROOKMAN

BRIEF OF PUBLIC CITIZEN AS AMICUS CURIAE

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This brief addresses a question of first impression in this Court: what standard governs evaluation of a request to compel disclosure of information identifying pseudonymous defendants whose online statements are said to be actionable.[1] Courts elsewhere have held that, without both prima facie evidence and legal argument showing that the would-be plaintiff can succeed on his underlying claims, coupled with a balancing of the interest in maintaining anonymity against the plaintiff's interest in securing relief against actionable speech, the First Amendment right to speak anonymously bars such discovery. Because the trial court performed the legal and evidentiary analysis, but failed to balance the interests, the Court should vacate the judgment and remand for further proceedings.

1. INTEREST OF AMICUS CURIAE[2]

Public Citizen, Inc., is a public interest organization based in Washington, D.C. with members in all 50 states, including Connecticut. As described in the application for leave to file as amicus curiae, Public Citizen has participated as amicus curiae in many state and federal cases, beginning with *Dendrite v. Doe*, 775 A.2d 756 (N.J. App. 2001), that have helped establish the national consensus standard for deciding whether a plaintiff should be allowed to use court process to strip speakers of their First Amendment right to speak anonymously.

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[1] Courts use "anonymous" and "pseudonymous" interchangeably in this context. *Blossoms &; Blooms, Inc. v. Doe*, 2022 WL 3030788, at *3 (E.D. Pa. July 29, 2022).

[2] No counsel for a party wrote this brief in whole or in part and no counsel or party contributed to the costs of the preparation or submission of the brief. No person, other than the amicus curiae, its members or its counsel made such monetary contribution.

2. BACKGROUND

As electronic communications have become essential tools for speech, the Internet 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 profane or brilliant, to all who choose to listen. As the Supreme Court explained in *Reno v. American Civil Liberties Union,* "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." 521 U.S. 844, 853 (1997). Full First Amendment protection applies to online speech. *Id*. at 870.

Knowing that people love to share their views, companies like Facebook, Twitter and Yelp provide platforms where the public can address issues in which they are interested. Similarly, many media companies allow the public to append comments to news stories. For example, We the People Hartford, http://wethepeoplehartford.blogspot.com/, features articles posted by Brookman, but anyone can post comments on the article.

Individuals who speak online often use pseudonyms. Nothing prevents individuals from using real names, but many people choose to protect their identities, which encourages the uninhibited exchange of ideas and opinions.

Many Internet forums have a significant feature—and the blog at issue in this case is typical—that makes them very different from other forms of published expression. People who disagree with published criticisms can typically respond immediately at no cost, giving facts or opinions to vindicate their positions and, possibly, persuading the

audience that they are right and their critics are wrong. 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 disputes about facts and opinions.

3. SUMMARY OF ARGUMENT

This petition for discovery is not the typical one, such as when an employee seeks to identify the manufacturer of a machine that injured her at work, or when a victim of police brutality seeks to identify which one of a crowd of law enforcement officers was responsible for her injuries. In such cases, identifying an unknown defendant can be just the first step toward establishing liability for damages, but the identification does not inherently deprive the would-be defendant of any legal rights.

Here, compelling disclosure of the anonymous speaker's identity affects legal rights, because speakers have a First Amendment right to communicate anonymously so long as they do not violate others' rights in doing so. Thus, when a complaint is brought against an anonymous speaker, courts must balance the right to obtain redress from the perpetrators of civil wrongs against the right to anonymity of those who have done no wrong. These rights come into conflict when a plaintiff seeks to compel disclosure of a speaker's identity.

Identifying the speaker gives the plaintiff immediate relief as well as a powerful new weapon, enabling him to employ extra-judicial self-help measures to counteract both the speech and the speaker. It also creates a substantial risk of harm to the speaker, who forever loses the right to remain anonymous, and may be exposed to efforts to punish or deter her speech.

Whatever the reason for speaking anonymously, a rule that

makes it too easy to remove the cloak of anonymity will deprive the marketplace of ideas of valuable contributions. Moreover, our legal system ordinarily does not give substantial relief of this sort, even on a preliminary basis, absent proof that the relief is justified because success is likely and the balance of hardships favors the relief. The constitutional challenge for courts is to develop a test for identifying anonymous speakers that makes it neither too easy for defamers to hide behind pseudonyms, nor too easy to unmask critics—thus violating their First Amendment right to speak anonymously.

Among the state and federal courts that have considered these issues, there is a well-developed consensus that only a compelling interest is sufficient to outweigh the free speech right to remain anonymous. As numerous courts have held, courts faced with a demand for discovery to identify an anonymous Internet speaker so that she may be served with process should: (1) require notice to the potential defendant and an opportunity to defend her anonymity; (2) require the plaintiff to specify the statements that allegedly violate her rights; (3) review the complaint to ensure that it states a cause of action based on each statement and against each defendant; (4) require the plaintiff to produce evidence supporting each element of her claims; and (5) balance the equities, weighing the potential harm to the plaintiff if disclosure is not compelled against the harm to the defendant from losing her right to remain anonymous, in light of the strength of the plaintiff's evidence of wrongdoing. Applying this approach, a court can thus ensure that a plaintiff does not obtain important relief—identification of anonymous critics—and that the defendant is not denied important First Amendment rights unless the equities favor the plaintiff.

Everything that the plaintiff must do to meet this test, he must also do to prevail on the merits of his case. So long as the test does not demand more information than a plaintiff would be reasonably able to provide shortly after filing the complaint, the standard does not unfairly prevent plaintiffs with legitimate grievances from achieving redress against anonymous speakers. And, cases from jurisdictions that apply this standard show that plaintiffs regularly succeed in meeting the test and compelling such disclosure.

4. ARGUMENT

4.1 The Constitution Limits Compelled Identification of Anonymous Speakers.

The First Amendment protects the right to speak anonymously. *Watchtower Bible & Tract Soc'y v. Village of Stratton*, 536 U.S. 150, 166-167 (2002); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960). These cases have celebrated the important role played by anonymous or pseudonymous writings over the course of history, from Shakespeare and Mark Twain to the authors of the Federalist Papers. As the Supreme Court stated in *McIntyre:*

> [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.

Thus "anonymous distribution of one's ideas is not only protected by the first amendment, but lies at the core of its existence." *Seymour v. Elections Enf't Comm'n*, 255 Conn. 78, 99-100, 102-103 (2000).

Internet speakers may choose to speak anonymously for a variety of reasons. They may wish to avoid having their views stereotyped according to presumed racial, gender or other characteristics. They may be associated with an organization but want to express an opinion of their own, without running the risk that, despite attribution disclaimers, readers will assume that the group orchestrated the statement. Anonymity also provides a way for a writer who may be personally unpopular to avoid having readers prejudge her message simply because they do not like its proponent. Some Internet speakers may want to say or imply things about themselves that they are unwilling to disclose otherwise. Or, they may wish to say things that might make other people angry and stir a desire for retaliation. Kosseff, *United States of Anonymous* 201-213 (2022) ("Kosseff"). *See also* Masnick, *What's In A Name: The Importance Of Pseudonymity & The Dangers Of Requiring Real Names*, https://www.techdirt.com/2011/08/05/whats-name-importance-pseudonymity-dangers-requiring-real-names/.

Another reason to remain anonymous is the torrent of online hatred that sometimes follows online denunciations. Wilson, *An Online*

Agitator, a Social Media Exposé and the Fallout in Brooklyn (New York Times June 2, 2018), available at https://www.nytimes.com/2018/06/06/nyregion/amymek-mekelburg-huffpost-doxxing.html. That hatred can lead to real-world consequences, as Internet users will often "doxx" the targets of their ire and then communicate with employers or neighbors, Bowles, *How 'Doxxing' Became a Mainstream Tool in the Culture Wars* (New York Times Aug. 30, 2017), available at https://www.nytimes.com/2017/08 /30/ technology/doxxing-protests.html, or even bring weaponry to "investigate" claims of wrongdoing. *E.g.*, *Pizzagate Conspiracy Theory,* https://en.wikipedia.org/wiki/Pizzagate_conspiracy_theory. The danger of doxxing can be a basis for withholding identifying information. *In re: Sealed Search Warrant*, 2022 WL 3582450, at *4 (M.D. Fla. Aug. 22, 2022).

Although the Internet allows individuals to speak anonymously, it also creates an unparalleled capacity to track down those who do. Anyone who sends an e-mail or visits a website leaves an electronic footprint that **could** start a path that can be traced back to the original sender. To avoid the Big Brother consequences of a rule that enables any company or political figure to identify critics, simply for the asking, the law provides special protections against such discovery. *E.g.*, Lidsky & Cotter, *Authorship, Audiences and Anonymous Speech*, 82 Notre Dame L. Rev. 1537 (2007).

When courts do not create sufficient protections against discovery to identify anonymous Internet speakers named as defendants, the discovery can be the main point of the litigation, in that plaintiffs may identify their critics and then seek no further relief from the court. For example, Raytheon filed suit in a Massachusetts state court to identify anonymous posters, learned that they were employees, and dropped its

litigation but fired the critics. *Kosseff*, supra at 93-100. A similar course of events transpired in *Swiger v. Allegheny Energy*, 2006 WL 1409622 (E.D. Pa. May 19, 2006). Invoking special procedures for identifying alleged copyright infringers, Jehovah's Witnesses pursued scores of subpoenas to identify anonymous internal critics who would then face community shunning remedies, without ever seeking any judicial remedy – apart from identification – against them. Levy, *WatchTower's misuse of copyright to suppress criticism*, https://pubcit.typepad.com/clpblog/2022/03/watch-towers-misuse-of-copyright-to-suppress-criticism.html.

In this case, Benvenuto's bill of discovery invokes judicial authority to compel a third party to provide information. A court order, even when issued at the behest of a private party, is state action and hence is subject to constitutional limitations. Consequently, an action for damages for defamation must satisfy the standards for First Amendment scrutiny. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964). Injunctive relief is similarly subject to constitutional scrutiny. *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971).

The courts have evolved a standard for compelling journalists to disclose the sources of the journalists' allegedly libelous speech. In those cases, even in the absence of a shield law, courts apply a three-part test, under which the person seeking to identify the anonymous speaker has the burden of showing that (1) the issue on which the material is sought is not just relevant to the action, but goes to the heart of his case; (2) disclosure of the source to prove the issue is "necessary" because the party seeking disclosure is likely to prevail on all the other issues in the case; and (3) the discovering party has exhausted all other means of proving this part of his case. *Gonzales v. Natl. Broad. Co.*, 194 F.3d 29,

33 (2d Cir. 1999); *Baker v. F and F Inv.*, 470 F.2d 778, 783 (2d Cir. 1972).

Because compelled identification trenches on the First Amendment right of anonymous speakers to remain anonymous, justification for infringing that right requires proof of a compelling interest, and beyond that, the restriction must be narrowly tailored to serve that interest. *McIntyre*, 514 U.S. at 347; *Seymour*, 255 Conn. at 102-103.

> If Internet users could be stripped of . . . anonymity by a civil subpoena enforced under the liberal rules of civil discovery [without a factual showing], this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights.

Doe v. 2theMart.com, 140 F. Supp.2d 1088, 1093 (W.D. Wash. 2001).

4.2 The Court Should Require a Legal and Evidentiary Showing and a Balancing of Interests for the Identification of John Doe Defendants Sued for Critical Speech.

The fact that a plaintiff wants to sue over certain speech does not create a compelling government interest in taking away the defendant's anonymity. The challenge for courts is to find a standard that makes it neither too easy nor too hard to identify anonymous speakers. Setting the bar too low will chill the public 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." *Pilchesky v. Gatelli*, 12 A.3d 430, 445 (Pa. Super. 2011).

Although the issue is one of first impression in Connecticut, state

appellate courts elsewhere have adopted a standard that protects the First Amendment rights of anonymous Internet speakers whose speech is allegedly tortious. Each of these courts has recognized that the proper standard depends on striking the right balance between the interests of plaintiffs in gaining redress and the interests of the accused speakers in defending their First Amendment right to speak anonymously. If the identification burden is too high, then online wrongdoers can hide too easily behind pseudonyms to engage in libel and other wrongs with impunity. But, if the burden is too low, those who face speech that they do not like can too easily abuse judicial process to identify their critics, enabling them to strike back through extrajudicial self-help as soon as the critics are identified, and use the example as a warning to deter other potential critics. Thus, an overly permissive unmasking standard would deprive the marketplace of ideas of important information and opinions that are not actionable, and, in fact, constitutionally protected, but which some may be motivated to express only if they can be confident that they can maintain their privacy.

Although each state appellate court has worded its opinion slightly differently, they have adopted a remarkably uniform standard. 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, the District of Columbia, Indiana, Kentucky, Maryland, New Hampshire, Pennsylvania, Texas, and Washington have joined New Jersey in holding that a plaintiff cannot obtain the identity of a defendant who is alleged to have engaged in wrongful speech unless the plaintiff first presents admissible evidence

of the elements of the cause of action that the plaintiff alleges.[3] Seven of the twelve 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;[4] that is the test that the Court should adopt here. Many federal courts also

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[3] *Doe v. Coleman*, 497 S.W.3d 740, 747 (Ky. 2016); *Thomson v. Doe*, 356 P.3d 727 (Wash. App. Div. 1 2015); *Ghanam v. Does*, 845 N.W.2d 128 (2014); *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).

[4] *Dendrite; Independent Newspapers; Indiana Newspapers; Mortgage Specialists; Mobilisa; Pilchesky; and Doe v. Coleman*, supra. In *Thomson v. Doe*, 356 P.3d at 735, the Washington Court of Appeal said that a balancing stage could be appropriate in some cases, but it declined to address that question because no facts were before the Court that could support applying that additional consideration. 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); a second panel endorsed the *Dendrite* approach for cases where the Doe has not appeared. *Ghanam v. Does*, 845 N.W.2d 128 (Mich. App. 2014).

follow *Dendrite* and require a separate balancing stage.[5] Other states have held, in agreement with the Delaware Supreme Court in *Cahill*, that the First Amendment requires evidence supporting the plaintiff's claim, while rejecting the balancing stage.

Courts applying the *Dendrite* standard have been careful to ensure that it does not prevent plaintiffs with meritorious claims from proceeding. In defamation cases, for example, it would normally be unfair to expect a plaintiff to present evidence of actual malice without knowing who the defendant is; the trial court below properly held that plaintiff could not be expected to have such evidence. Many plaintiffs have succeeded in identifying Doe defendants in jurisdictions that follow *Dendrite* and *Cahill*. *E.g.*, *Yelp Inc. v. Superior Court*, 224 Cal. Rptr. 3d 887, 903 (Cal. App. 2017); *Warren Hosp. v. Does 1-10*, 63 A.3d 246, 250 (N.J. Super. App. Div. 2013). Indeed, in *Immunomedics v. Doe*, 775 A.2d 773 (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. And, even if a plaintiff does not meet the standard at first, it may be able to bring a second motion supported by sufficient evidence and argument on

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[5] *E.g.*, *Signature Management Team v. Doe*, 876 F.3d 831, 838 (6th Cir. 2017); *In re DMCA § 512(h) Subp. to Twitter*, 2022 WL 2205476, at *3 (N.D. Cal. June 21, 2022); *Delaware Valley Aesthetics v. Doe 1*, 2021 WL 2681286, at *5 (E.D. Pa. June 30, 2021); *Koch Industries v. Doe*, 2011 WL 1775765 (D. Utah May 9, 2011) ("The case law . . . 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)).

balancing.

4.3 The Court Should Remand for Consideration of *Dendrite* Balancing.

Even if the plaintiff has properly alleged a claim for defamation, and has presented evidence in support of that claim,

> [t]he final factor to consider in balancing the need for confidentiality versus discovery is the strength of the movant's case . . .. If the case is weak, then little purpose will be served by allowing such discovery, yet great harm will be done by revelation of privileged information. In fact, there is a danger in such a case that it was brought just to obtain the names . . .. On the other hand, if a case is strong and the information sought goes to the heart of it and is not available from other sources, then the balance may swing in favor of discovery if the harm from such discovery is not too severe.

Missouri ex rel. Classic III v. Ely, 954 S.W.2d 650, 659 (Mo. App. 1997).

Similarly, *Dendrite* called for such individualized balancing when the plaintiff seeks to compel identification of an anonymous Internet speaker:

> [A]ssuming the court concludes that the plaintiff has presented a prima facie cause of action, 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.

775 A.2d at 760.

A standard comparable to the test for grant or denial of a preliminary injunction, where the court considers the likelihood of success and balances the equities, is particularly appropriate because an order of disclosure is an injunction—not even a preliminary injunction. In every case, compelling disclosure of the name of an anonymous speaker causes permanent, irreparable injury, because once speakers lose anonymity, they can never get it back. Moreover, denial of discovery to identify the defendant based on either lack of sufficient evidence or balancing the equities does not compel dismissal of a complaint. Plaintiffs can renew their requests after submitting more evidence and additional equitable arguments. Application of *Dendrite* equitable balancing prong is particularly appropriate considering that a Connecticut Bill of Discovery is an equitable remedy. *Berger v Cuomo*, 230 Conn. 1, 5-7 (1994). Indeed, Benvenuto argued below that a court considering a Bill of Discovery must exercise its discretion pursuant to general equitable principles. Amicus Appx. 33.

The inclusion of a balancing stage allows Does to show that identification may expose them to significant danger of extra-judicial retaliation. In that case, the court might require a greater quantum of evidence on the elements of plaintiff's claims so that the equities can be correctly balanced.

On the other side of the balance, a court should consider the strength of the plaintiff's case and his interest in redressing the alleged violations. The court can consider not only the strength of the plaintiff's evidence but also the nature of the allegations, the likelihood of

significant damage to the plaintiff, and the extent to which the plaintiff's own actions are responsible for the problems of which he complains. The balancing stage allows courts to apply a *Dendrite* analysis to many different causes of action, not just defamation, following the lead of the Arizona Court of Appeals, which in *Mobilisa v. Doe* warned against the consequences of limiting the test to only certain causes of action. 170 P.3d at 719.

For example, in *In re Anonymous Online Speakers*, 661 F.3d 1168, 1177 (9th Cir. 2011), the court of appeals said that when a lawsuit is filed over commercial speech by anonymous defendants, the lesser protection that the First Amendment affords for commercial speech should be reflected in a more permissive approach to identifying the defendant. Regardless of whether commercial speakers have less opportunity to speak anonymously, the balancing stage of *Dendrite* allows a court to modify the extent of the prima facie showing, in light of the lesser protection for the interest of commercial speakers, depending on what evidence the plaintiff is able to present from which an inference that the speech is commercial may be drawn.

Similarly, when the plaintiff claims that an anonymous defendant has participated in infringement though the use of mass downloading systems, the defendant's free speech interest (in displaying a list of recordings that they like) is generally minimal, and courts apply a relaxed standard to plaintiff's showing of a prima facie case of infringement. *E.g.*, *Sony Music v Does 1-40*, 326 F. Supp.2d 556 (S.D.N.Y. 2004). But, where the potential impact on being publicly identified is high, such as when mass downloading suits are brought over alleged sharing of hard porn, hoping that embarrassment at being publicly identified as defendants—whether accurately or not—will be

enough to induce even the innocent defendants to pay thousands of dollars in settlements, courts are much more careful to ensure a strong showing of a *prima facie* case. *AF Holdings v. Does 1-1058,* 752 F.3d 990, 992-993 (D.C. Cir. 2014); *Mick Haig Productions v. Doe*, 687 F.3d 649, 652 & n.2 (5th Cir. 2012). And, when copyright claims are asserted in a context where it is apparent that the plaintiff hopes to suppress criticism, normal *Dendrite*-style standards are imposed. *E.g. Art of Living v. Does 10*, 2011 WL 5444622, at *5-*7 (N.D. Cal. Nov. 09, 2011). The different treatment of claims under the same statute reflects concepts of balancing.

In this case, the trial court held a trial, received evidence, and conducted a careful examination of the allegedly defamatory statements, winnowing out those statements that it held did not state provable facts and denying discovery to identity the authors of those statements, Brookman Appx. 357-363, but it did not then consider the balancing of interests with respect to the four statements whose authors it ordered Brookman to identify. The specific circumstances may well support significant interests on both sides. The Court should vacate the ruling below and remand so that each side can introduce evidence and advance argument on how the balancing test affects this case.

From Brookman's side, for example, there are a number of respects in which the anonymous speakers may face serious dangers of extra-judicial self-help remedies if they are identified. The complaint in this case makes clear plaintiff's belief that by posting comments about the operation of the Hartford police department on a blog, the Does violated department rules and hence are subject to discipline; Benvenuto, who is both a supervisor and a leader in the police union, could likely inflict such economic punishment on any Doe he identifies.

Brookman Appx. 152-15. And, the risk of extra-judicial self-help that commenters face is considerably greater, if Hartford's ban on social media by police officers reflects that common cultural aversion to internal criticism known as the "blue wall of silence." The informal penalties administered to officers who criticize their fellows can include assignments to less convenient and more hazardous jobs, harassment, and even losing back-up in an emergency. Government Accountability Project, *Breaking the Blue Wall of Silence* (2022). The danger of such consequences counts heavily in a proper *Dendrite* balancing.

As for Benvenuto's interests, his testimony below made clear that, if believed, some of the blog comments whose authors he wants to sue could seriously harm his reputation. For example, if members of the public believe Benvenuto is a "racist," Brookman Appx. 360, 361, that could cause grave harm to his reputation. But the conclusory sobriquet "racist" is often treated as non-actionable rhetorical hyperbole or name-calling, rather than as provably false statements, as discussed by the Delaware Supreme Court in *Cousins v. Goodier*, 2022 WL 3365104, at *11 (Del. Aug. 16, 2022). *See also Williams v. Lazer*, 495 P.3d 93, 97-98 (Nev. 2021) ("general allegations of racism, sexism, and unprofessional and unethical conduct" are non-actionable opinions)*; Squitieri v. Piedmont Airlines* 2018 WL 934829, at *4 (W.D.N.C. Feb. 16, 2018) (calling plaintiff "racist" and "fascist" was not defamatory).

No doubt it is hurtful to be the subject of name-calling, but each author of each individual comment should receive individual justice. Unless there is evidence that specific comments that made false factual statements have caused real damage to his reputation, such hurt feelings would not warrant depriving that critic of his right to speak anonymously. General claims like the ones Benvenuto made below, that

"all these comments" have hurt his reputation, Amicus Appx. 31, do not support enforcement of discovery to identify the authors of specific statements.

When a plaintiff's interest in enforcing its rights is more theoretical than real, courts sometimes deny identification in light of *Dendrite* balancing. *In re DMCA § 512(h) Subpoena to Twitter*, 2022 WL 2205476, at *7 (N.D. Cal. June 21, 2022). On remand, the court below should assess whether Benvenuto has shown that each blog comment on which he seeks to proceed has caused genuine damage to his reputation. In light of that showing the Court should apply *Dendrite* balancing to decide whether to order discovery of that speaker's identity.

5 CONCLUSION

The Court should vacate the judgment below and remand for further consideration under the *Dendrite* balancing standard.

Dated: September 2, 2022.

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CERTIFICATION

The undersigned attorney hereby certifies, pursuant to Connecticut
Rule of Appellate Procedure § 67-2 et seq., that on September –,2022:

1) the electronically submitted application for leave to file as amicus curiae and proposed amicus brief and appendix have been delivered electronically to the last known e-mail address of each counsel of record for whom an e-mail address has been provided; and
2) the electronically submitted brief and appendix and the filed paper brief and appendix have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and
3) a copy of the brief and appendix have been sent to each counsel of record in compliance with §§ 62-7 and 62-7A as applicable, as published below; and
4) the brief and appendix being filed with the appellate clerk are true copies of the brief and appendix that were submitted electronically; and
5) the word count of the brief is 4,451 words; and
6) the paper brief complies with all provisions of the rules, §§ 62-7 and 62-7A, as may be applicable, to the best of counsel's ability; and
7) the electronic brief complies with all provisions of the rules, §§ 62-7 and 62-7A, as may be applicable, to the best of counsel's ability; and

8) no rule deviations apart from the number of words were requested.

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A courtesy copy shall immediately be sent to the judge who rendered the judgment from which appeal was taken:

The Honorable CESAR A. NOBLE
Judge of the Connecticut Superior Court
Hartford Judicial District Courthouse
95 Washington Street
Hartford, Connecticut 06106

Dated: September 2, 2022.

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APPENDIX TO PUBLIC CITIZEN'S AMICUS BRIEF

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BENVENUTO, VINCENT G.	:	JUDICIAL DISTRICT HARTFORD
v.	:	AT HARTFORD, CONNECTICUT
BROOKMAN, KEVIN M.	:	JANUARY 12, 2021

BEFORE THE HONORABLE CESAR NOBLE, JUDGE

A P P E A R A N C E S:

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BY ATTY. TOMASIEWICZ:

Q Lieutenant Benvenuto, why do you want to bring this bill of discovery?

A Because I want to unmask the people that have been defaming me.

Q And why do you want to do that?

A I want to hold them accountable.

Q And why do you want to hold them accountable?

A Because they're hurting my reputation. They're hurting my reputation inside the department, and they're hurting my reputation in the city and they're also hurting my reputation with my family and friends. Numerous people have come out and made certain assumptions about me, based upon all these comments since they've been on this blog.

Q And can you provide some examples of how relationships have changed for you, based on what we are seeing on this blog?

A I can tell you right now that after this came out on these blogs, there are people commenting on different sites it must be true he is a racist, it must be true he must be corrupt, people think that I'm homophobic and I make -- ascertain -- I make comments on people's faiths. All absolutely all these things, they all hurt my reputation.

Q How about relationships with the department, have they been impacted?

A They have been impacted. Every time I come to work, I have to walk on eggshells because I don't know what people

NO: HHDCV19-6119733-S	:	SUPERIOR COURT
BENVENUTO, VINCENT G.	:	JUDICIAL DISTRICT HARTFORD
v.	:	AT HARTFORD, CONNECTICUT
BROOKMAN, KEVIN M.	:	JANUARY 13, 2021

BEFORE THE HONORABLE CESAR NOBLE, JUDGE

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understand there is a potential issue of spoliation that's going to be raised at some pint.

But can you articulate for the Court, Mr. Tomasiewicz, how it's material to your request for access to his computers?

ATTY. TOMASIEWICZ: The way I see the bill that's in front of the Court, it's an equitable bill. And what we are asking from the Court is to invoke it's great powers of discretion and equity, and when the Court invokes it's great powers of discretion and equity, the Court, I believe, respectfully, would look at a myriad of factors, included to but not limited to whether there is information that is reasonably sought that could support a cause of action, and included but not limited to the credibility of the party that we are seeking information from.

So if the Court finds that there is a potential issue of spoliation, then that could drive the Court, influence the Court, allow the Court a ratio decidendi that it's equitable powers should be invoked in favor of the bill of discovery.

The Court may be disturbed that there is a potential issue of spoliation, and that could be a trigger for the Court to invoke the bill of discovery. And that is what I am trying to put in front of His Honor.