No. 22-0937

SUPREME COURT OF TEXAS

Jane Doe,
Petitioner,

v.

Allison Publications, LLC,
Respondent.

From the Second Court of Appeals at Fort Worth
(No. 02-21-00330-CV)

BRIEF OF PUBLIC CITIZEN AS AMICUS CURIAE SUPPORTING PETITION FOR REVIEW

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INTEREST OF AMICUS CURIAE

Public Citizen is a public interest organization headquartered in Washington, D.C., and with an office in Austin, Texas; it has members in all 50 states. Public Citizen has participated as amicus curiae in many state and federal cases, beginning with *Dendrite Int'l v. Doe No. 3*, 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, and the procedures for protecting that right in the face of assertions that the identification of anonymous speakers is needed to allow a civil litigant to enforce its legal rights. Public Citizen has also filed as amicus curiae in cases under the anti-SLAPP laws in many states and has advocated for both the expansion of anti-SLAPP protections for political and consumer speech, and the preservation of anti-SLAPP laws when under attack, such as the lobbying effort to water down the protections of the Texas Citizens Participation Act several years ago.[1]

[1] No counsel for any party authored this brief in whole or in part and no person or entity, other than amicus, has made a monetary contribution to its preparation or submission

STATEMENT OF THE CASE

Plaintiff-respondent Allison Publications, LLC ("Allison") sued defendant-petitioner Jane Doe for defamation, alleging that she telephoned advertisers for Allison's publication, *D Magazine*, and falsely accused Allison of being "racist." CR 7, ¶ 41. Doe contends that she is a journalist investigating practices at various publications, and that her calls were inquiries into Allison's practices. CR 21-22.

In the trial court, Allison moved for leave to pursue early discovery to obtain Doe's identity, CR 34, which Doe opposed, citing her First Amendment right to speak anonymously and urging the court to follow the decision of the Texarkana Court of Appeals in *In re Does 1-10*, 242 S.W.3d 805 (Tex. App. 2007), which, in turn, had followed the consensus approach in other jurisdictions, exemplified by such decisions as *Doe v. Cahill*, 884 A.2d 451 (Del. 2005), and *Dendrite Int'l v. Doe No. 3*, 775 A.2d 756 (N.J. App. 2001), requiring plaintiff to show a legally sufficient basis for its claims, supported by prima facie evidence, before breaching the defendant's First Amendment right to speak anonymously. Doe, for her part, filed a special appearance and moved to dismiss under the Texas Citizens Participation Act ("TCPA"), contending that her phone calls were

an exercise of the right of free speech in connection with a matter of public concern, and putting Allison to the test of submitting both legal argument and clear and specific evidence sufficient of a prima facie case for each element of its defamation claim. CR 9-21, 120-158. Doe also moved to dismiss under Rule 91a. CR 108.

In response to the TCPA motion, Allison relied on a declaration executed by the editor of *D Magazine*, which reported what certain advertisers purportedly had told unidentified people at the magazine and averred that the alleged statements were false. CR 187-189. The declaration did not set forth the actual words allegedly uttered by Doe; nor did it include any averments on personal knowledge about what Doe had said. *Id.* Nor were there affidavits from the advertisers who had heard the allegedly defamatory words. Doe submitted an affidavit, affirmed on personal knowledge but signed "Jane Doe." CR 21.22. Doe's counsel indicated that he did not know Doe's real name and that he had deliberately declined to learn her name so that he could not be compelled to reveal it, but assured the district court that he had interviewed his client, and that she had satisfied him she was, in fact, the person whom Allison was suing, citing the example of anonymous affidavits submitted

in *In re Doe ("Trooper")*, 444 S.W.3d 603, 605 (Tex. 2014). 2 RR 23-24, 42.

The trial court granted Doe's TCPA motion to dismiss. CR 594-596. The court specifically accepted Doe's contention that significant parts of the Allison affidavit were hearsay. CR 594 ¶ 2. The court of appeals reversed, holding that, when a lawsuit is filed against an anonymous speaker, the Doe defendant cannot seek "affirmative relief" by filing a TCPA motion seeking dismissal of the lawsuit and an award of attorney fees. Rather, the court effectively held, the Doe defendant must identify herself to the court to bring a TCPA motion to dismiss.

REASONS FOR GRANTING REVIEW

A. The Court Should Grant Review to Decide Whether an Anonymous Defendant Sued for Speech on a Matter of Public Concern May Use the Texas Citizens Participation Act to Demand That the Plaintiff Show a Prima Facie Basis for its Claims Before It Can Compel the Unmasking of its Critics.

Doe defendants have a First Amendment right to speak anonymously, *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995), and in recognition of that right, courts across the country have held, in a line of cases beginning with *Dendrite*, *supra*, that a plaintiff who is suing over allegedly wrongful speech published anonymously cannot

demand identification of the Doe defendant unless it first provides a legal and evidentiary showing that its lawsuit has at least enough merit to make out a prima facie case. *See infra* Part B (urging review to address the *Dendrite* standard).

The TCPA, by its terms, applies to lawsuits based on speech on matters of public concern regardless of whether the defendant is sued in her real name or as a Doe defendant, such as by using the pseudonym that the defendant used in speaking. The TCPA is a mechanism that the Texas legislature has provided to protect the free speech rights of defendants against the chilling effect of being targeted by litigation over their speech. *In re Lipsky*, 460 S.W.3d 579, 589 (Tex. 2015). Allowing Doe defendants to invoke the TCPA to secure dismissal of cases in which the plaintiff cannot present legal argument and prima facie evidence in support of its claims at an early stage of the litigation protects anonymous speakers against the chilling effect of a rule that allows the mere bringing of a case to give a plaintiff access to the speaker's identity. The court of appeals below was wrong to deprive Jane Doe of that protection.

The *Dendrite* standard for assessing a plaintiff's effort to discovery

the identity of an anonymous defendant is similar to the standard for assessing SLAPP suits under the TCPA (except that the TCPA sets a higher evidentiary standard for plaintiffs). Moreover, the anti-SLAPP statutes of other states have been invoked by Doe defendants in a number of cases to seek dismissal of suits filed against them for the exercise of their free speech rights. *E.g.*, *Doe v. Roe*, 638 S.W.3d 614 (Tenn. 2021); *John Doe 2 v. Superior Court*, 1 Cal. App.5th 1300, 206 Cal. Rptr.3d 60 (2016); *Global Telemedia Intern. v. Doe 1*, 132 F. Supp.2d 1261 (C.D. Cal. 2001).

Moreover, in the first appellate case in which a Michigan court was asked to consider application of the Dendrite standard on a Doe defendant's motion to quash, the appellate panel declined to adopt a "special rule" such as Dendrite, pointing instead to the Doe defendant's ability to seek a protective order and to file a motion for summary disposition or summary adjudication which, the court said, provide sufficient support for the First Amendment rights at stake. *Thomas M. Cooley Law School v. Doe 1*, 833 N.W.2d 331 (Mich. App. 2013). In that regard, the court drew on a line of Michigan authority holding that summary adjudication plays a key role in protecting speakers from the

chilling effect that the mere need to defend against libel claims can have on robust free speech. *Lins v. Evening News Ass'n*, 342 N.W.2d 573, 577 (Mich. App. 1983).

Although the decision below is the first appellate decision in Texas presenting the issue of whether a Doe defendant sued for allegedly wrongful anonymous speech may seek outright dismissal to protect her anonymity, the issue is likely to recur frequently as a result of this Court's recent decision in *Glassdoor v. Andra Group, LP*, 575 S.W.3d 523 (Tex. 2019). Many Texas cases in which *Dendrite* issues have been raised were discovery petitions under Texas Rule of Civil Procedure 202. But *Glassdoor* held that the pendency of a Rule 202 petition does not toll the one-year statute of limitations for suing over allegedly defamatory speech. Because of *Glassdoor*, libel plaintiffs are likely to file more Doe lawsuits, rather than Rule 202 petitions to identify Doe speakers, to try to keep limitations from running.

Moreover, the reasons given by the Court of appeals for refusing to allow anonymous defendants to file TCPA motions do not withstand scrutiny. The Court of appeals suggested that an anonymous defendant lacks "standing" to file a motion to dismiss the lawsuit against her. 654

S.W.3d at 219-220. Whatever the problem may be with such motions, it cannot be standing. The plaintiff is trying to hale the anonymous defendant into court on the the claim that the anonymous defendant has spoken wrongfully, and it has invoked the Court's power to serve discovery to identify her. The anonymous defendant will have to defend against the plaintiff's lawsuit unless the case is dismissed because it does not state a claim or because, under the TCPA, the plaintiff cannot present clear and specific evidence sufficient to make out a prima facie case. Surely if anybody has standing to seek dismissal of the lawsuit, it is the anonymous defendant.

Texas law allows a plaintiff to issue third-party subpoenas before serving the defendant. A libel plaintiff can file a Doe lawsuit and issue a third-party subpoena to identify the speaker, and the Doe may have to intervene to protect their anonymity. The Doe may be the only party challenging the subpoena. And Texas courts, including this one, have recognized an anonymous speaker's standing to challenge such discovery efforts.

Thus, in *In re Doe ("Trooper")*, 444 S.W.3d 603, 605 (Tex. 2014), a putative libel plaintiff filed a Rule 202 petition seeking the name,

address, and telephone number of the owner of an anonymous blog hosted by Google. Although Google did not oppose the petition, the anonymous blogger, appearing through counsel without revealing his identity, filed a special appearance challenging the court's jurisdiction and moved to quash the discovery, asserting his First Amendment right to speak anonymously. *Id.* After the trial court ordered Google's deposition and the court of appeals denied mandamus, this Court granted the anonymous blogger's petition for mandamus, recognizing that he "cannot ignore this Rule 202 proceeding without losing his claimed First Amendment right to anonymity." *Id.* at 609. This Court held that a Rule 202 plaintiff must plead facts showing personal jurisdiction over the putative defendant and directed the trial court to vacate its discovery order because the plaintiff had failed to do meet his burden. *Id.* Although neither the plaintiff nor this Court knew the blogger's identity, the Court nevertheless recognized the anonymous blogger's standing to seek judicial relief to protect his First Amendment right to anonymity.

Similarly, in *In re Does 1-10*, 242 S.W.3d 805, 810 (Tex. App. – Texarkana 2007, no pet.), a hospital sued ten unnamed "Doe" defendants for libel and other claims based on statements posted on an Internet site.

The trial court granted the plaintiff's "ex parte request to non-party to disclose information," ordering the internet service provider SuddenLink Communications to reveal John Doe 1's identity if he did not object to the discovery request after notice. *Id.* Counsel appeared for Doe 1 and argued that the discovery was unwarranted, but the trial court ordered SuddenLink to disclose Doe 1's name and address. *Id.* at 810-11. As this Court later did in *In re Doe ("Trooper")* the Court of appeals entertained the anonymous speaker's petition for mandamus and, finding the discovery unwarranted by procedural law, directed the trial court to vacate its order. *Id.* at 818, 823. The Court of appeals expressly rejected the plaintiff's argument that Doe 1 lacked standing to seek mandamus, noting that Rule 192.6(a) provides that any person from whom discovery is sought, and any person affected by the discovery request, may seek a protective order – and that one basis for such relief is "to protect the movant from 'invasion of personal, constitutional, or property rights.'" *Id.* at 812. The court held that Doe 1 had standing to seek judicial relief "based on a possible invasion of [his] personal and constitutional rights," even though his name was not known to the plaintiff or the court. *Id.*

Just as a Doe has standing to challenge a subpoena, she has

standing to file an anti-SLAPP motion. Like Doe 1 in *In re Does 1-10*, the Doe here is the defendant in the lawsuit and accordingly has standing to move for relief under the TCPA.

The appeals court also suggested that an anonymous defendant cannot file a TCPA motion because, as an anonymous defendant, the Doe is only "a legal fiction to the trial court" and that, as a result, the court lacks subject matter jurisdiction over the motion to dismiss the lawsuit against that "legal fiction." 654 S.W.3d at 220. By that reasoning, however, the court would also lack subject matter jurisdiction over the lawsuit against Doe, or, any third-party discovery that the plaintiff undertook to identify the speaker. Here, it is the plaintiff that has alleged that the Doe is a real person, who has allegedly committed a civil wrong, and the Doe has alleged in her TCPA motion (and averred) that she is the person identified in the petition. CR 9, 21. Doe's allegation is adequate to show her concrete interest in the outcome and to support standing. Conversely, if the presence of a Doe defendant means that there is no case or controversy supporting subject matter jurisdiction, then the petition itself should have been dismissed.

The appeals court relied on cases saying that plaintiffs can

generally not bring lawsuits pseudonymously. 654 S.W.3d at 215-216. But those cases are based on the proposition that an individual who seeks access to the courts to obtain civil redress has to accept the obligation to litigate publicly. Jane Doe, however, is not a plaintiff in this case, and she has not come to court willingly—she is trying to stay out of court by having the lawsuit against her dismissed. And even if the Court were to hold that she cannot seek an award of attorney fees because that is a form of affirmative relief, at the very least she ought to be allowed to ask for the dismissal of the lawsuit against her, in order to preserve her First Amendment right to speak anonymously that the lawsuit threatens to do by empowering the plaintiff to serve third-party discovery. Moreover, lack of subject matter jurisdiction is not a basis for denying an award of attorney fees incurred defending against a baseless lawsuit. *Devon Energy Prod. Co. v. KCS Resources*, 450 S.W.3d 203, 220 (Tex. App.–Hous. [14th Dist.] 2014). *See also Willy v. Coastal Corp.*, 503 U.S. 131, 137 (1992); *Ratliff v. Stewart*, 508 F.3d 225, 231 (5th Cir. 2007).

Finally, the court of appeals expressed concern about the possibility that Jane Doe's anonymity could deprive the plaintiff in this case of the protections of res judicata should it prevail in the litigation. 654 S.W.3d

at 221. That concern is misplaced, because it ignores the fact that, if Doe's TCPA motion is denied, and her effort to block the discovery on Dendrite grounds is denied, then the litigation would proceed and Allison will have access to the discovery tools that it needs to identify Doe and serve her with process. Neither the TCPA nor *Dendrite* protects defendants who engage in actionable defamation. TCPA movants and Doe movants under *Dendrite* sometimes win and sometimes lose.[2] And if the TCPA motion is granted, it means the plaintiff's claim would fail, regardless of the identity of the defendant against whom it has failed to sufficiently allege and prove a basis for claiming actionable defamation.

This amicus brief takes no position on whether the trial court properly granted Doe's TCPA motion. The appeals court did not reach Allison's appellate arguments directed to the merits of the TCPA ruling,

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[2] E.g., Emswhiler, *One Man's Bid to Clear His Name Online*, Wall Street Journal (Feb 24, 2017), available at https://www.wsj.com/articles/3-million-dead-turtles-and-a-sex-website-inside-one-mans-bid-to-clear-his-name-on-the-internet-1487949319 (reporting $38 million judgment against a Doe defendant); Huessner & Kim, *'Anonymous' Posters to Pay $13 Million for Defamatory Comments*, ABC News (Apr. 24, 2012), available at https://abcnews.go.com/Business/jury-awards-13-million-texas-defamation-suit-anonymous/story?id=16194071. Plaintiffs securing identities via subpoena often enter out-of-court settlements with the defendants.

including its argument that it should have been allowed limited discovery before a ruling on that motion, because it decided that Doe could not file such a motion as an anonymous defendant. If this Court grants review and vacates the decision below, Allison's arguments will remain to be decided, and the court of appeals, and perhaps the trial court as well, can address those questions further on remand.

B. The Court Should Grant Review to Decide Whether Texas Should Join the Consensus Approach Adopted by Appellate Courts in Other States, Holding That the First Amendment Requires a Plaintiff Suing on a Claim That Anonymous Speech Is Actionable to Show That it Has at Least a Prima Facie Legal and Evidentiary Basis for its Claims Before it Can Force the Identification of the Defendant.

Review is also warranted because the ruling below threatens protection for the First Amendment right to speak anonymously, recognized in *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), and *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 Court said in *McIntyre*, 514 U.S. at 342, 357:

> [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*, 762 A.2d 880, 892 (Conn. 2000).

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*, 762 A.2d at 893.

> 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). *Accord, Mobilisa, Inc. v. Doe*, 170 P.3d 712, 718-720 (Ariz. App. 2007).

Although this Court has not yet addressed the issue, other state appellate courts 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 the 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 state appellate courts have used slightly different phrasing, 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 and Washington, as well as Texas, 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 each element of the cause of action that the plaintiff alleges.[3] A number

[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*, 303 Mich. App. 522, 541-42 (Mich. App. 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

of federal courts have reached the same conclusion. [4]

The Court should grant review in this case to decide whether the Texarkana Court of Appeals was right in *In re Does 1-10*, 242 S.W.3d 805 to join the consensus approach of courts in other states, requiring a would-be plaintiff to show a legally and factually-supported prima facie basis for its claims before it can use the litigation to deprive its critics of their First Amendment right to speak anonymously.

CONCLUSION

For these reasons, the Court should grant review.

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A.2d 451 (Del. 2005).

[4] *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); *Music Group Macao Com. Offshore Ltd. v. Does*, 82 F. Supp. 3d 979, 981 (N.D. Cal. 2015); *Koch Industries v. Doe*, 2011 WL 1775765, at *10 (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)).

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CERTIFICATE OF COMPLIANCE

I certify that I prepared this document on a computer using Word Perfect and contains 3920 words as determined by that software's word-count function, excluding the sections of the document listed in Rule 94(i)(1) of the Texas Rules of Civil Procedure.

/s/ Paul Alan Levy
Paul Alan Levy

CERTIFICATE OF SERVICE

I certify that, on this 27th day of January, 2023, this brief was served by filing it via the Court's electronic filing system, which will serve on counsel of record.

/s/ Peter D. Kennedy
Peter D. Kennedy