IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

KATHERINE MCLAUGHLIN and CITY OF BEACHWOOD,	)	Case No. CV-22-973016
Plaintiffs,	)	JUDGE ANDREW J. SANTOLI
vs.	)	MEMORANDUM OF PUBLIC CITIZEN AS AMICUS CURIAE ADDRESSING THE MOTION FOR DISCOVERY
JOHN DOE,	)	
Defendant.	)	

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This amicus brief addresses an issue on which there is no binding precedent in this Court: what standard governs evaluation of a request to authorize discovery of information identifying pseudonymous defendants whose online statements are said to be actionable, and what procedures should be followed before that adjudication is made. Courts elsewhere have held that, without notice to the anonymous defendants and an opportunity to defend their anonymity, and 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. This Court should require no less.

INTEREST OF AMICUS CURIAE

Public Citizen is a public interest organization based in Washington, D.C. with members in all 50 states, including Ohio. 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.

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.

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 feature 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.

FACTS AND PROCEEDINGS TO DATE

After plaintiff Katherine McLaughlin was appointed Chief of Police by plaintiff City of Beachwood in 2021, she faced public criticism. Several critical comments were posted to police department's Facebook page, and someone using the email address

MissMarples21@proton.me sent an email to the city's elected officials as well as to the media containing serious criticisms of her leadership. And Fraternal Order of Police Lodge 86, which represents the members of Beachwood's Police Department, held a vote of no confidence in plaintiff McLaughlin. See Piorkowski, Beachwood police union holds vote of no confidence in Chief McLaughlin, as mayor, city directors laud her work, Clevelamd.com (Dec. 20, 2022), https://www.cleveland.com/community/2022/12/beachwood-police-union-holds-vote-of-no-confidence-in-chief-mclaughlin-as-mayor-city-directors-laud-her-work.html.

On November 21, 2022, claiming to have received complaints about a hostile work environment from an unidentified police officer, and expressing concern that the City could be held liable if it failed to take action to protect that unidentified person, City leaders sponsored a resolution at a meeting of the Beachwood City Council, seeking to authorized the expenditure of $25,000 to hire the Minc Law Firm to conduct an investigation into the identities of the individuals who had posted or emailed certain public comments, which, the sponsors insisted, were defamatory. Id. A video of the meeting, which is posted online at https://beachwoodoh.new.swagit.com/videos/189111, reveals that the issue was controversial, and the resolution was approved by a close vote. The sponsors of the resolution declined to say which police officer had complained, or to specify the allegedly defamatory comments. As the video shows, at 1:42, 2:12. they reassured the objecting council members that their resolution was not directed at identifying any person who posted criticisms without being a city employee, representing that if it turned out that the critics were not city employees,

no further action would be taken. They further said (at 1:42, 1:43) that if the critics were police officers, then the city would respond by imposing adverse employment actions, which the critics could then contest. Id. Finally, the sponsors indicated (at 1:39) that the Minc firm is uniquely qualified for the job, justifying a $25,000 retainer, because it had lawyers in foreign jurisdictions to help it enforce subpoenas seeking to identify anonymous Internet users.[1]

This action followed. On behalf of both the City of Beachwood and Katherine McLaughlin, the complaint alleges that an anonymous "Defendant" has defamed both the City and McLaughlin by posting the Beachwood Police Department's Facebook page, using the pseudonyms Amin Yashed and John Marconi, and by sending an email using the Proton Mail system and using the name MissMarples21. Plaintiff McLaughlin filed a motion on January 12, 2023, seeking express judicial permission to issue a California subpoena to Facebook to identify Yashed and Marconi as well as "Relffom Nevets," who is identified on Yashed's Facebook profile as bring married to Yashed. and to seek discovery in Switzerland from Proton Mail.

SUMMARY OF ARGUMENT

This motion for discovery in this case is not typical. In the typical case when discovery is sought to identify a Doe defendant, an employee seeks to identify the manufacturer of a machine that injured her at work, or a victim of police brutality seeks to identify which one of a crowd of law enforcement officers was responsible for

[1] As the motion for discovery indicates, at page 9 and Exhibit B, Facebook's parent company is in California, and Proton is based in Switzerland.

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 both immediate relief and a powerful weapon, enabling the use of 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 her 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.

The standard proposed in this amicus brief varies from the approach suggested by plaintiffs in two significant respects: Public Citizen urges the Court to require plaintiffs to ensure notice to the Does now, so that they will have the opportunity to oppose discovery in this Court if they choose to do so, rather than having to hire California or Swiss counsel. Second, we urge the Court to apply the Dendrite balancing test, taking into consideration plaintiffs' evident intention to impose employment-related discipline if they can identify Beachwood police officers as being behind the public criticism of the city's police chief, and its expressed hope of having a "huge deterrent effect" on future speech.

ARGUMENT

A. The First Amendment Requires a Compelling Interest and a Narrow Tailoring Before the Right to Criticize Public Officials Anonymously Is Infringed.

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 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*, 255 Conn. 78, 99-100, 102-103 (2000). The United States Court of Appeals for the Sixth Circuit has held that a compelling interest is needed to support discovery to identify anonymous speakers. *NLRB v. Midland Daily News*, 151 F.3d 472, 475 (6th Cir. 1998).

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. *See* 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. *See* 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 may "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. Similarly, in a recent case filed by a law professor against anonymous students who posted some of his exam question online, the professor's lawyer admitted that this client did not want damages from the alleged infringers and might dismiss his suit once he got their names, because his only interest was in bringing them up on school disciplinary charges. *Berkovitz v. Does*, No. 2:22-cv-01628 (C.D. Cal.), discussed in Levenson, *Hoping to Identify Cheaters,*

a Professor Sues His Own Students, (New York Times, Mar. 17, 2022), https://www. nytimes.com/022/03/17/s/chapman-law-cheating-professor. html

In this case, plaintiff McLaughlin invokes judicial authority to compel third parties 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 disclosure of 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); *Hade v. City of Fremont*, 233 F. Supp. 2d 884, 889 (N.D. Ohio 2002); *Fawley v. Quirk*, 11822, 1985 WL 11006, at *2 (Ohio App. 9th Dist. July 17, 1985).

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

B. The Court Should Require Notice to the Does, 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 no appellate court in Ohio has yet addressed the issue, 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 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 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.[2] 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.[3] That is the test that the Court should adopt here. Many federal courts also follow *Dendrite* and require a separate balancing stage.[4] 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.[5] But although plaintiffs point to

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[2] *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 (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).

[3] *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 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).

[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); *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)).

[5] Solers (D.C.), In re Does (Texas); Krinsky (California)

the test applied by the California Court of Appeals in Krinsky (which omits the balancing stage), in fact more jurisdictions apply the final Dendrite 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 balancing.

C. The Court Should Apply Each Prong of the *Dendrite* Balancing Test Before Placing Its Imprimatur on Discovery in Other Jurisdictions.

1. The Court Should Require Notice to Each of the Does Before It Rules on the Motion to Authorize Discovery

The first requirement in the *Dendrite / Cahill* consensus approach is for the plaintiffs to notify each Doe of their efforts to take away the Does' anonymity. Indeed,

notice and an opportunity to defend is a fundamental requirement of constitutional due process. *Jones v. Flowers*, 547 U.S. 220 (2006). Thus, courts have held that when they receive a request for permission to subpoena an anonymous Internet poster, the plaintiff must undertake efforts to notify the posters that they are the subject of a subpoena, and then withhold any action for a reasonable period of time until the defendant has had time to retain counsel. *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 579 (N.D. Cal. 1999); *Dendrite*, 775 A.2d at 760. In *Dendrite*, for example, the trial judge required the plaintiff to post on the message board a notice of an application for discovery to identify anonymous message board critics. The notice identified the four screen names that were sought to be identified, and provided information about the local bar referral service so that the individuals concerned could retain counsel to voice their objections, if any. The Appellate Division specifically approved this requirement. 342 N.J. Super. at 141, 775 A.2d at 760.

Plaintiffs cite *Krinsky* to argue that notice is a superfluous requirement, Mem. Supporting Discovery at 6-7. In that case, however, the only Doe defendant whose anonymity was at issue was already before the Court through the filing of a motion to quash. Here, by contrast, plaintiff seeks to pierce the identity of four different Internet personas, and each author is entitled to have his or her own opportunity to protect the right of anonymous speech. Although the complaint is pleaded against a single "defendant," plaintiffs are not entitled to know identities of all authors based on the convenient assumption that they are all the same person. Moreover, although this case has been covered in the local media, and some of the Does may have learned of the

motion seeking to identify them, the Court should protect the anonymous speakers by require notice to each of them before ruling on the motion to authorize discovery.

Strictly speaking, Ohio law does not require this Court to authorize discovery in California or Switzerland in support of plaintiffs' quest to identify their critics. But it is apparent that plaintiffs' counsel hope to secure this Court's authorization of discovery so that, in the event their subpoenas are challenged, they can cite the Court's ruling to support their efforts. This Court should, therefore, give each of the Does the full benefit of the *Dendrite* standard before authorizing the pursuing of discovery elsewhere, including notice. Giving such notice would not be difficult – plaintiffs could provide notice by email to the Miss Marples21 email address, and could send Facebook messages to the three accounts whose owners it seeks to identify.

In this case, prompt notice may well be a significant protection, because each of the anonymous speakers is likely local. During the Beachwood City Council meeting, in the course of pitching the resolution to pay $25,000 to the Minc Law Firm to identify the persons who authored online criticisms of Police Chief McLaughlin, the proponent of the resolution said that the Minc Firm is unique in that it has lawyers in foreign jurisdictions to help it pursue its investigations. *See* Beachwood City Council Meeting, November 7, 2022, https://beachwoodoh.new.swagit.com/videos/189111, at 1:39. Perhaps some of the Doe defendants may choose to defend their rights by a motion to quash in California, which provides extra protection through a statute that provides for awards of attorney fees when a court grants a motion to quash a subpoena issued in aid of a proceeding in a foreign jurisdiction. California Code of Civil Procedure

Section 1987.2(c). But a Doe defendant located in the Cleveland area may be better able to find and afford counsel to appear in this Court than in California or Switzerland, and each Doe defendant should have the opportunity to decide whether they prefer to defend their First Amendment rights here.

Moreover, in the course of soliciting payment from the City of Beachwood for the bringing of this action, the head of the Minc law firm appears to have claimed a special relationship with the provider of Proton Mail, the service used by the Doe defendant using the pseudonym Miss Marples21 to deliver her allegedly defamatory message to the Beachwood City Council, contending that Proton was ready to turn over her identifying information "like they have done for my firm on other legal matters we've handled in the past." *See* Attached Exhibit A. Consequently, for that defendant, litigation before this Court may be the only way to preserve her First Amendment right to speak anonymously.

2. The Court Should Decide Whether a Valid Claims for Relief Have Been Stated Against Each Anonymous Speaker.

At the second stage of the *Dendrite* test, the Court should require the plaintiffs to set forth the precise statements alleged to be actionable and to show that the complaint states a legally sound claim against each of the Doe defendants sought to be identified. There is some reason to doubt the validity of the legal claims asserted here.

First of all, although there are two plaintiffs in this action, one of them does not have any valid legal claim, because "the Constitution does not tolerate in any form .

. . the spectre of prosecutions for libel on government." *Rosenblatt v. Baer*, 383 U.S. 75, 81 (1966), citing *New York Times v. Sullivan*, 376 U.S. 254 (1964). Indeed, in pitching his firm's services at the November 2022 Council meeting, at 2:25, Minc agreed with the statement that the city could not be a plaintiff in a defamation action: "The City has no right to a defamation lawsuit." No doubt the city's leaders have an "interest" in identifying employees who criticized its appointed police chief, so that they can try to fire them, and deter future criticism by employees, but it has not pleaded any legally valid claim against them.

Second, at least some of the allegedly defamatory statements appear to be merely hyperbolic and exaggerated statements that are not actionable under either the First Amendment or the Ohio constitution. *See Seaton v. TripAdvisor*, 728 F.3d 592, 598 (6th Cir. 2013);*Wampler v. Higgins*, 752 N.E.2d 962, 970 (Ohio 2001); *Vail v. Plain Dealer Publishing Co.*, 72 Ohio St.3d 279 (1995). For example, the post by "Amin Yashed" suggesting that members of the police department dealing with the chief of police will "need mental health counseling" is no more than sarcastic hyperbole about subjective mental states, which the Ohio courts hold to be in the nature of opinion. *Dudee v. Philpot*, 133 N.E.3d 590, 603 (Ohio App. 1st Dist. 2019), *citing Stohlmann v. WJW TV*, 8th Dist. Cuyahoga No. 86491, 2006-Ohio-6408, 2006 WL 3518121, ¶ 27. In contrast, other statements, such as the highly specific quoted words attributed to McLaughlin in the email from MissMarples21, may be susceptible to a defamation claim if McLaughlin never uttered them (and her verification of the complaint avers

she did not).

3. The Court Should Weigh the Equities in Deciding Whether to Authorize the Subpoenas.

Even if Chief McLaughlin 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.

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. Indeed, as the Council meeting video shows, at 2:24, the proponent of the hiring of the Minc firm said that he hoped that the very pursuit of this case would have a "very large deterrent effect," discouraging strong anonymous criticisms of City staff such as McLaughlin, whether or not the criticisms are accurate, because criticism creates a "hostile work environment" for officials like McLaughlin: "We're not going to allow employees to undermine those in authority in their department."

On the other side of the balance, the Court should consider the strength of the plaintiffs' case and their 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.

In this case. the anonymous speakers may face serious dangers of extra-judicial self-help remedies if they are identified. The complaint and the motion for discovery in this case make clear plaintiffs' belief that the authors of the anonymous comments at issue in this case are themselves police officers. Plaintiffs take the position that, by posting comments about the chief of police on Facebook, and by emailing criticisms to the City Council to the media, the Does compromised the "paramilitary structure" that they portray as characterizing not only the Beachwood police department but most police departments, and hence made themselves subject to discipline. And the city's leaders made clear at the November 2022 Council meeting that they are not planning to pursue this defamation action if the discovery leads to the identification of a non-

employee resident of Beachwood, or indeed to any other person who is not an employee of the police department. But they plan to find out the names of the critics, and if the identified Does are ordinary residents of Beachwood, the Court should consider the fact that a city's police department, and its police chief, have ample discretionary and nonpublic means to impose considerable inconvenience, and even personal danger, on members of the public who may have antagonized them through criticism.

In addition, according to the proponents of the Council resolution financing this litigation, if the anonymous speakers **are** police officers, this defamation action will not be pursued to a conclusion; instead, the officers will be subject to employment discipline, and will have resort to whatever due process protections are provided to employees subject to discipline. The possibility of extra-judicial self-help is a significant consideration that the Court should weigh in a *Dendrite* balancing of the equities

Moreover, the risk of extra-judicial self-help by the City and the police chief that commenters face if they are members of the police department is considerably greater, if Beachwood's aversion to the use of social media by police officers reflects an effort to stymie internal criticism, The informal penalties administered to officers who break the "blue wall of silence" by criticizing their fellows can include assignments to less convenient and more hazardous jobs, harassment, and even losing back-up in an emergency. *See* Government Accountability Project, *Breaking the Blue Wall of Silence* (2022). The danger of such consequences counts heavily in a proper *Dendrite* balancing.

CONCLUSION

The Court should consider the motion for leave to pursue discovery in light of the foregoing principles.

Respectfully submitted,

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