New York Supreme Court

Appellate Division—Second Department

Docket Nos.:
2021-03700
2021-04476

In the Matter of the Petition of

ROBERT F. KENNEDY, JR.,

Petitioner-Respondent,

For an Order Pursuant to Section 3102(c) of the Civil Practice Law and Rules to compel pre-action disclosure from:

KOS MEDIA, LLC d/b/a Daily Kos,

Respondent-Appellant,

of the identity of the defendants, JOHN DOE(s) being unknown to the Petitioner, in an action to be commenced.

BRIEF FOR *AMICUS CURIAE* PUBLIC CITIZEN, INC. IN SUPPORT OF PETITIONER-RESPONDENT

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INTRODUCTION

This brief addresses a question of first impression in this Court but well-settled elsewhere: what standard governs judicial evaluation of a request to compel disclosure of information identifying pseudonymous defendants whose online statements are said to be actionable. Courts across the country have held that, without prima facie evidence that plaintiffs could succeed on their underlying claims, the First Amendment right to speak anonymously bars such discovery.

In 2020, plaintiff Robert F. Kennedy, Jr. addressed a protest rally in Berlin; the press reported that it was attended by thousands of neo-Nazis and organized in large part by anti-Semitic and neo-Nazi groups. A blogger on the Daily Kos website named DowneastDem did the same. Kennedy reacted to that blog post by filing a pre-litigation petition seeking to identify the post's author. The petition was verified only by Kennedy's lawyer, who was not in Berlin and hence could not have personal knowledge of whether anything said in the blog post was false. Nevertheless, the court below authorized issuance of a subpoena to Kos Media (which owns Daily Kos), which has now appealed, arguing both that prelitigation petitions must always be supported by affidavits on personal knowledge and that such evidence is especially needed when the discovery sought will compel the identification of an anonymous speaker.

This amicus brief addresses the legal standard that the Court should apply in deciding whether to override anonymous speakers' First Amendment rights. As courts in a dozen other states and throughout the federal system have recognized, only when a plaintiff can show both that he has alleged a valid claim and that he has a prima facie evidentiary basis for that claim should he be permitted to pursue discovery to identify an anonymous speaker. The brief also argues that, because the anonymous speaker is a Maine resident who could not be sued in New York for defaming a New York resident, the Supreme Court should consider on remand whether, under the proper standard for assessing such discovery, discovery should be denied because New York courts lack jurisdiction to order that a nondomiciliary blogger's identity be revealed.

INTEREST OF AMICUS CURIAE

Public Citizen, Inc. is a public interest organization based in Washington, D.C. with members in all 50 states, including New York. As described in detail in the Affirmation of Paul Alan Levy in support of the motion 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.[1]

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:*

> From a publisher's standpoint, [the Internet] constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers and buyers. . . . 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.
>
> Full First Amendment protection applies to speech on the Internet.

521 U.S. 844, 853, 870 (1997).

Knowing that people love to share their views, many companies, such as Facebook, Twitter and Yelp, allow posting by members of the public. The website Daily Kos includes many articles posted by Kos's own staff, but it also allows any member of the public to register for an account and then post articles of their own.

[1] Counsel for Public Citizen also represents the anonymous blogger seeking to quash the California subpoena that was issued based on the order on appeal.

Individuals who blog on the site or post messages often do so under pseudonyms. Nothing prevents an individual from using her real name, but many people choose nicknames that protect the writer's identity from those who disagree with him or her, which encourages the uninhibited exchange of ideas and opinions.

Many Internet forums have a significant feature—and Daily Kos is typical—that makes them very different from almost any other form of published expression. Although members of the public can criticize as well as praise on these forums, 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.

DowneastDem blogs regularly on Daily Kos. *See, e.g.*, https://www.dailykos.com/users/downeastdem. After Robert F. Kennedy, Jr. spoke at a protest against coronavirus restrictions in Berlin, Germany on August 29, 2020, widespread media coverage by the New York Times, Wall Street Journal, and CBS News, as well as several foreign outlets in Germany and elsewhere, mentioned the large neo-Nazi presence at the protest and identified

several far-right groups that were involved in creating the protest. DowneastDem posted a short article along the same lines, using the headline "Anti-Vaxxer RFK JR. joins neo-Nazis in massive Berlin 'Anti-Corona' Protest" and hyperlinking to articles about the protest on the website of Berlin's largest daily, Der Tagespiegel. A lawyer representing Kennedy posted an open letter to Kos and DowneastDem as a comment to this blog article challenging its veracity, telling Kennedy's side of the story, and demanding that the post be removed, threatening legal action.

Kennedy initiated this proceeding in the Supreme Court for Westchester County on November 30, 2020. Kennedy alleged that DowneastDem's blog post falsely stated that Kennedy had "joined" neo-Nazis by speaking at the Berlin protest, and falsely identified some of the organizations involved in organizing the protest. Instead, Kennedy claimed, he had spoken only at a separate protest organized by a group called Querdenken. The petition alleged that the court had jurisdiction because "the defamatory statements at issue were published throughout the United States and internationally, including in Westchester County." The petition was verified only by Kennedy's counsel, who was not in Berlin for the protest and did not have any basis for personal knowledge of what happened at the protest or who had organized it.

Kos opposed the petition, arguing that the petition should be rejected for lack of a firsthand affidavit, and because the statements in the blog post either were nonactionable opinion or were true. DowneastDem did not appear to defend her anonymity. The Supreme Court rejected Kos's arguments that the verification of the petition for pre-litigation discovery must be based on personal knowledge, holding that mere allegations are sufficient. The court also ruled, without expressly addressing Kos's arguments about protected opinion, that the petition stated a sufficient basis for believing that Kennedy might have a valid claim for defamation. Accordingly, the court ruled that Kennedy could serve a subpoena on Kos seeking to identify DowneastDem.

Kos appealed to this Court, but Kennedy domesticated his subpoena in California, where Kos is located. DowneastDem moved to quash in the Superior Court for Alameda County, California, while Kennedy cross-petitioned to enforce the subpoena. DowneastDem asserted her First Amendment right to speak anonymously, as recognized by *Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231 (Cal. App. 2008), and its progeny, contending that her statements were nonactionable opinion, and that her statements if factual were substantially true. She also argued that, because she is a Maine resident, the Westchester County court did not have personal jurisdiction over any claim based on her allegedly defamatory statements,

and hence that the court could not order her to be identified based on any claim that she had defamed Kennedy. For his part, Kennedy argued that full faith and credit required the California court to honor the Westchester County Supreme Court's ruling that Kennedy could take discovery to identify her. Kennedy contended that DowneastDem could not fail to participate in the petition for pre-litigation discovery and then attack the Supreme Court's ruling collaterally. The California Superior Court opted to stay the California proceedings pending the outcome of this appeal.

SUMMARY OF ARGUMENT

The petition seeking pre-litigation discovery in this case is not the typical one, such as when an employee seeks to identify the manufacturer of a machine that injured her at work so that she can bring a product liability action against the right defendant, 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 implicates First Amendment 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. In cases such as this one, these rights come into conflict when a plaintiff seeks an order compelling disclosure of a speaker's identity, which, if successful, would irreparably destroy the defendant's First Amendment right to remain anonymous.

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, not only on the speech at issue, but with respect to all speech posted with the same pseudonym. Moreover, the unmasked speaker 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 the courts is to develop a test for the identification of anonymous speakers that makes it neither too easy for deliberate defamers to hide behind pseudonyms, nor too easy for a big company or a public figure to unmask critics—thus violating their First Amendment right to speak anonymously—simply by filing a complaint that states a claim for relief.

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 the subpoena is not enforced 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 plaintiff has a realistic chance of success on the merits.

Everything that a plaintiff must do to meet this test, they 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 enforcing such subpoenas.

ARGUMENT

I. 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:

> [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.

McIntyre, 514 US at 341-342, 356.

The right to speak anonymously is fully applicable online. The Supreme Court has treated the Internet as a public forum of preeminent importance because it places in the hands of any individual who wants to express his views the opportunity to reach other members of the public who are hundreds or even thousands of miles away, at virtually no cost. *Reno v. ACLU*, 521 U.S. 844, 853, 870 (1997).

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 ensure that readers will not prejudge her message simply because they do not like its proponent. They may want to say or imply things about themselves that they are unwilling to disclose otherwise. And 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) (forthcoming) ("Kosseff").

An equally valid 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. In this very case, after Kennedy's nonprofit denounced DowneastDem for exercising

her right to speak anonymously and Public Citizen's lawyers for providing her with legal representation, Public Citizen received complaints from members of the public. Levy Affirmation ¶ 15. Similarly, identifying Doe could subject her to online attacks.

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 by asking, the law provides special protections against such subpoenas. *E.g.*, Lidsky & Cotter, *Authorship, Audiences and Anonymous Speech*, 82 Notre Dame L. Rev. 1537 (2007).

When courts do not create sufficient barriers to subpoenas to identify anonymous Internet speakers named as defendants, the subpoena can be the main point of the litigation, in that plaintiffs may identify their critics and then seek no further relief from the court. Thompson, *On the Net, in the Dark*, California Law Week, Volume 1, No. 9, at 16, 18 (1999). Lawyers who represent plaintiffs in these cases have also urged companies to bring suit, even if they do not intend to pursue the action to a conclusion, because "[t]he mere filing of the John Doe action

will probably slow the postings." Eisenhofer & Liebesman, *Caught by the Net*, 10 Business Law Today No. 1 (Sept.-Oct. 2000), at 40. These lawyers have similarly suggested that clients decide whether it is worth pursuing a lawsuit only after finding out who the defendant is. *Id.* As discussed in *Kosseff*, supra at 93-100, 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. A similar course of events transpired in *Swiger v. Allegheny Energy*, No. 05-cv-5725, 2006 WL 1409622 (E.D. Pa. May 19, 2006).

Kennedy's subpoena 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, even when brought by an individual, must satisfy First Amendment scrutiny. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964). Injunctive relief, even to aid a private party, is similarly subject to constitutional scrutiny. *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971).

The courts have recognized the serious chilling effect that subpoenas to reveal the names of anonymous speakers can have on dissenters and the First Amendment interests that are implicated by such subpoenas. *E.g.*, *FEC v. Florida*

for Kennedy Committee, 681 F.2d 1281, 1284-1285 (11th Cir. 1982); *Ealy v. Littlejohn*, 560 F.2d 219, 226-230 (5th Cir. 1978). In a closely analogous area of law, the courts have evolved a standard for the compelled disclosure of the sources of libelous speech, recognizing a qualified privilege against disclosure of such otherwise anonymous sources. In those cases, 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. *Lee v. Department of Justice*, 413 F.3d 53, 60 (D.C. Cir. 2005); *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 288 (4th Cir. 2000); *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 encroaches 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.

> 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).

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

The fact that a plaintiff has sued 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 potential posters from exercising their First Amendment right to speak anonymously. The possibility of losing anonymity in a future lawsuit could intimidate anonymous posters into self-censoring their comments or simply not commenting at all." *Cahill*, 884 A.2d at 457.

A. The *Dendrite* Standard Ensures Protection of Anonymous Speech.

Although the issue is one of first impression in New York, state appellate courts elsewhere have adopted a standard that protects the First Amendment rights of anonymous Internet speakers who have been sued for allegedly tortious speech before they may be identified pursuant to subpoena. Each of these courts has recognized that the proper standard for adjudicating such controversies depends on striking the right balance between the interests of plaintiffs in gaining redress for

allegedly tortious speech 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, companies or political figures facing speech that they do not like will too easily be able to abuse the judicial process to identify their critics, enabling them to strike back through extrajudicial self-help and to use such unmasking 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 are constitutionally protected, but which some may be motivated to express only if they can be confident that they can maintain their privacy.

Only a compelling government interest can overcome the right to speak anonymously. *McIntyre*, 514 U.S. at 348. Thus, the outcome of this case turns on whether the mere filing of a petition that states a possible legal claim creates a compelling government interest, or whether more is required.

Although each state appellate court has worded its opinion slightly differently, there is a remarkable uniformity in the standards they have adopted. Following the lead of the first state appellate court to address the question (and the

case that lends its name to the standard), *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 alleged to have engaged in wrongful speech unless the plaintiff can present admissible evidence of the elements of the cause of action that the plaintiff alleges.[2] That is the test that the Court should adopt here.

Seven of the twelve states apply *Dendrite*'s 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] 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. Two additional states have construed their own

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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*, 845 N.W.2d 128, 141-42 (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 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.

court rules either to demand evidence before the subpoena can be sought or, at least, to give the anonymous defendant the opportunity to obtain a protective order unless such evidence is provided.[4] Federal courts have repeatedly followed *Cahill* or *Dendrite*.[5]

[4] 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); the second panel endorsed the *Dendrite* approach. *Ghanam v. Does*, 845 N.W.2d 128 (Mich. App. 2014). In Illinois, the Supreme Court has held that, because state procedure for pre-litigation discovery requires a plaintiff to file a sworn petition setting forth in detail a would-be defamation claim, including sworn allegations of falsity, such procedures provide protections analogous to *Dendrite*'s equitable balancing test, *Hadley v. Doe*, 34 N.E.3d 549 (Ill. 2015)

[5] *E.g.*, *Signature Management Team v. Doe*, 876 F.3d 831, 838 (6th Cir. 2017); *Highfields Capital Mgmt. v. Doe*, 385 F. Supp. 2d 969, 976 (N.D. Cal. 2005) (requiring an evidentiary showing followed by express balancing of "the magnitude of the harms that would be caused to the competing interests"); *East Coast Test Prep v. Allnurses.com*, 309 F. Supp. 3d 644, 676 (D. Minn. 2018) (agreeing with *Highfields Capital* and other cases that a plaintiff "must produce prima facie support for all of the elements of his or her case that are within his or her control" before identifying Doe defendants); *Art of Living Foundation v. Does 1-10*, 2011 WL 5444622 (N.D. Cal. Nov. 9, 2011) (endorsing the *Highfields Capital* test); *Fodor v. Doe*, No. 3:10-cv-0798, 2011 WL 1629572 (D. Nev. Apr. 27, 2011) (same); *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)); *Best Western Int'l v. Doe*, No. 06-cv-1537, 2006 WL 2091695 (D. Ariz. July 25, 2006) (five-factor test drawn from *Cahill*, *Dendrite,* and others); *In re Baxter*, No. 01-00026-M, 2001 WL 34806203 (W.D. La. Dec. 20, 2001) (preferred *Dendrite* approach, requiring a showing of reasonable possibility or probability of success); *Sinclair v. TubeSockTedD*, 596 F. Supp. 2d 128, 132 (D.D.C. 2009) (court did not choose between *Cahill* and *Dendrite* because plaintiff would lose under either standard); *Alvis Coatings v. Does*, No. 3L94 CV 374, 2004 WL 2904405 (W.D.N.C. Dec. 2, 2004) (court ordered identification after considering a detailed affidavit about how certain comments were false); *Doe I and II v. Individuals whose true names are unknown*, 561 F. Supp. 2d 249 (D. Conn. 2008) (identification ordered only after the plaintiffs provided detailed affidavits showing the basis for their claims of defamation and intentional infliction of emotional distress). In *In re Anonymous Online Speakers*, 661 F.3d 1168 (9th Cir. 2011), the Ninth Circuit declined to set a uniform standard, ruling that the proper approach depended on the nature of the speech at issue.

Requiring evidence, not just allegations, to support denying the right to speak anonymously is especially appropriate in a case where the plaintiff's claim concerns speech on a matter of public interest. Since November 2020, such a suit in a New York state court would be subject to an anti-SLAPP motion to dismiss, and the Supreme Court would be required to consider affidavits, and not the bare allegations of a complaint, in deciding whether the case should go forward. Given that Kennedy would have to furnish evidence that the speech was wrongful without having had the opportunity to take discovery to avoid a motion to dismiss, it is not unfair to require him to produce such evidence to obtain the relief of identifying his critic.

There is an additional, practical reason for this Court to join this consensus approach requiring an evidentiary showing before a New York court can authorize discovery to identify anonymous Internet speakers. New York courts lack subpoena jurisdiction to compel out-of-state companies to provide discovery, *Wiseman v. American Motors Sales Corp.,*103 A.D.2d 23 (1984); rather, pre-litigation subpoenas to such companies must be domesticated and enforced under the Uniform Interstate Deposition and Discovery Act. But most of the technology companies that host online content are located in Arizona, California, or Washington, each of whose appellate courts recognize some version of the

Dendrite standard. For a New York court to authorize discovery on terms that will not be sufficient to support discovery in the states where the subpoenas will have to be enforced would just be an exercise in futility.

B. The *Dendrite* Standard Allows Legitimate Claims to Proceed.

Courts applying the *Dendrite* standard have been careful to ensure that it does not prevent plaintiffs with meritorious claims from proceeding. 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); *Fodor v. Doe*, *supra; Does v. Individuals whose true names are unknown*, *supra*; *Alvis Coatings v. Does*, *supra*. Indeed, in *Immunomedics v. Doe*, 775 A.2d 773 (N.J. App. Div. 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 in its first motion to enforce, it may be able to bring a second motion supported by sufficient evidence so long as basis for denial of discovery was not that the allegedly defamatory statements were held not actionable as a matter of law.

1. The Court Should Adopt the *Dendrite* Balancing Prong.

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, a refusal to quash a subpoena for the name of an anonymous speaker causes irreparable injury, because once speakers lose anonymity, they can never get it back. Moreover, denial of a motion to identify the defendant based on either lack of sufficient evidence or balancing the equities does not compel dismissal of the complaint. Plaintiffs can renew their motions 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.

On the other side of the scale, 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 held 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. Under *Dendrite*, the court may 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 she likes) 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 when the potential impact of being publicly identified is highly prejudicial, such as when mass downloading suits are brought over alleged sharing of hard pornography in the apparent hope that embarrassment at being subpoenaed and then publicly identified as defendants—whether accurately or

not—will be enough to induce even innocent defendants to pay thousands of dollars in settlements, courts are much more careful to ensure a strong showing of a prima facie case. *E.g.*, *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, supra*. The different treatment of claims under the same statute reflects concepts of balancing.

III. This Court Should Direct the Supreme Court on Remand to Consider Whether Discovery Should Be Denied for Lack of Personal Jurisdiction over Defamation Claims Against DowneastDem.

Because Kennedy did not submit any admissible evidence in support of discovery, this Court should reverse. Kennedy may then seek the opportunity to meet the test that Kos Media and amici ask the Court to adopt. On remand, the Supreme Court should be directed also to address the issue of personal jurisdiction.

Kennedy's Petition for Pre-Litigation Discovery alleged that jurisdiction was proper because DowneastDem's post could be read worldwide, including in Westchester County. But New York expressly excludes defamation actions from the list of tortious acts that may give rise to personal jurisdiction over a non-domiciliary under CPLR § 302(a)(2) and (a)(3). *See, e.g.*, CPLR § 302(a)(2)

(excluding jurisdiction over non-domiciliaries for acts "as to a cause of action for defamation of character arising from the act"); *see also Montgomery v. Minarcin*, 693 N.Y.S.2d 293, 295–96 (3d Dept. 1999) ("defamation claims are excluded from CPLR 302's tort provisions"). The Court of Appeals has construed this aspect of the CPLR in detail, explaining that "[d]efamation claims are accorded separate treatment to reflect the state's policy of preventing disproportionate restrictions on freedom of expression." *SPCA of Upstate New York, Inc. v. Am. Working Collie Ass'n*, 18 N.Y.3d 400, 404-405 (2012) (noting that "the Legislature has manifested its intention to treat the tort of defamation differently from other causes of action"); *see also Legros v. Irving*, 327 N.Y.S.2d 371, 373 (1st Dept. 1971) ("[T]he Advisory Committee intended to avoid unnecessary inhibitions on freedom of speech or the press. These important civil liberties are entitled to special protections lest procedural burdens shackle them."). As a policy matter, the legislature did not vest New York courts with personal jurisdiction over alleged defamers who simply send defamatory statements into the state, even if those statements appear to target New York residents. *See Trachtenberg v. Failedmessiah.com*, 43 F. Supp. 3d 198, 203 (E.D.N.Y. 2014) ("Although New York could let its courts exercise 'impact-' or 'effects-only' jurisdiction [in the defamation context], it has chosen not to do so…").

Because DowneastDem has only a hobby blog, largely devoted to various political issues, especially in Germany and Maine, she is not engaged in transacting business within New York that might bring her within CPLR § 302(a)(1), which requires that (1) the defendant "transacts any business within the state"; and (2) the "cause of action aris[es] from" that transaction. But even if that section could apply, "New York courts construe 'transacts any business within the state' more narrowly in defamation cases than they do in the context of other sorts of litigation." *See SPCA*, 18 N.Y.3d at 404-405. For example, in *SPCA* itself, the out-of-state defendant (an Ohio non-profit) posted assertions on its website about the quality of services provided in New York by plaintiff (a New York operator of animal shelters). *See SPCA*, 18 N.Y.3d at 402–03. Such posts did not constitute an in-state transaction sufficient to establish personal jurisdiction over the defendant, even though the presumed purpose *and* effect of the posts was to warn New Yorkers about the conduct of the New York plaintiff. *See id.* (finding that "the statements were not written in or directed to New York" and noting that "[w]hile they were posted on a medium that was accessible in this state, the statements were equally accessible in any other jurisdiction"); *see also Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 248 (2d Cir. 2007) (no jurisdiction in a defamation claim over Iowa resident that posted claims on its website about

plaintiff New York moving company, even though the assertions had the greatest impact in New York and "targeted" New York insofar as they were mainly relevant to and likely to be read by plaintiff's potential customers in New York). Instead, in the defamation context, personal jurisdiction requires "purposeful activities" within New York State and a "substantial relationship" between those activities and the transaction out of which the cause of action arose. *See Talbot v. Johnson Newspaper Corp.*, 71 N.Y.2d 287 (1988); *see also Fischer v. Stiglitz*, 15-CV-6266(AJN), 2016 WL 3223627 (S.D.N.Y. June 8, 2016) (finding that "absent a quite substantial connection to New York, a defendant must engage in the relevant New York-based activity with the *intent* to create the allegedly defamatory work for jurisdiction to lie under CPLR § 302(a)(1)" (emphasis in original)).

It is well established that pre-litigation discovery cannot be granted in aid of a claimed cause of action over which the court in which discovery is sought would not have subject matter jurisdiction, *Matter of Wallace,* 667 N.Y.S.2d 768 (3d Dep't 1998), or when the person from whom discovery is sought is outside the court's personal jurisdiction. *Id*; *see also Matter of Legal Aid Soc'y of Suffolk Cnty.*, 120 N.Y.S.3d 720 (Table) at *3-4 (N.Y. Sup. Ct. Jan. 22, 2020). It is an open question in New York whether personal jurisdiction is needed over the person whose identification is sought; several courts elsewhere have held that personal

jurisdiction over the proposed defendant **is** required. *E.g.*, *AF Holdings,* 752 F.3d at 996; *In re Doe,* 444 S.W.3d 603, 608–09 (Tex. 2014); *Deluxe Mktg. v. deluxemarketingincscam.wordpress.com,* No. 13-cv-027144, 2014 WL 4162270, at *3 (D. Ariz. Aug. 20, 2014).

That matters here because, as established in the California litigation over Kennedy's domesticated subpoena, DowneastDem lives in Maine. Levy Affirmation ¶ 10. Indeed, Kennedy either knew, or should have known, of DowneastDem's Maine residence when this proceeding began. *Id.* ¶¶ 11-14. And the only allegedly New York-related action taken by DowneastDem was to contribute a blog post to Kos Media — an act clearly insufficient to establish a defamation claim against her in New York under CPLR 302(a)(1). *See SPCA*, 18 N.Y.3d at 403-04; *see also Best Van Lines*, 490 F.3d 239 at 248 ("the posting of defamatory material on a website accessible in New York does not, without more, constitute 'transact[ing] business' in New York for the purposes of New York's long-arm statute"). Moreover, there is reason to believe that Kennedy may live in California, Levy Affirmation ¶ 16, and thus that he would suffer any purported defamation injury there, rather than in New York.

Additionally, although Kennedy may be able to argue that Kos Media waived its objections to subpoena jurisdiction by failing to raise that issue,

DowneastDem has not waived her objections to personal jurisdiction or, indeed, to the use of prelitigation discovery to secure identifying information from a platform that is not, itself, subject to subpoena jurisdiction in New York.

Pre-action discovery in New York is meant to allow "disclosure to aid in bringing an action," including "discovery in order to obtain information relevant to determining who should be named a defendant." *Konig v. WordPress.com*, 978 N.Y.S.2d 92, 93 (2d Dept. 2013). But these purposes would not be served by allowing discovery in this case, given that the court's apparent lack of jurisdiction over DowneastDem forecloses the possibility that any viable cause of action can be brought in New York.

Regardless of whether it can ever be appropriate to use prelitigation discovery to identify a potential defendant who is not subject to personal jurisdiction in New York, an order authorizing discovery to identify a foreign domiciliary to enable suit over allegedly tortious speech strips that speaker of an important First Amendment right and gives the plaintiff a form of relief against that speaker. Orders depriving anonymous speakers of rights should not be entered unless the issuing court has jurisdiction to decide that speaker's rights.

To allow Kennedy to use pre-action discovery against Kos Media to unmask a non-domiciliary anonymous alleged defamer would subvert both the requirement

that petitioners seeking pre-action discovery into the identity of anonymous individuals state a meritorious claim and the legislative goal of limiting the reach of the New York long-arm statute. *See, e.g.*, *SPCA*, 18 N.Y.3d at 403-06. Indeed, what Kennedy proposes amounts to an end-run around the statute; DowneastDem is not subject to the jurisdiction of this Court, and could not be sued here, but Kennedy nonetheless seeks to use the power of this Court against her.

Rather than deciding on this appeal whether possible lack of personal jurisdiction is fatal to Kennedy's pre-litigation discovery petition, the Court should instruct the Supreme Court to address this issue on remand, deciding whether there is a basis for exercising personal jurisdiction over DowneastDem and, if not, whether the petition for pre-litigation discovery should be denied on that ground alone.

CONCLUSION

The order allowing Kennedy to serve a subpoena should be vacated, and the case remanded for further proceedings.

Respectfully submitted,

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