MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Docket No. CUM-15-558

MARIE GUNNING,
Appellant,

v.

JOHN DOE,

Appellee.

On Appeal from the Cumberland County Superior Court

BRIEF OF AMICI CURIAE PUBLIC CITIZEN, INC., AND AMERICAN CIVIL LIBERTIES UNION OF MAINE FOUNDATION

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This appeal presents a question of first impression in Maine: whether a plaintiff seeking to identify an anonymous detractor by whom she claims to have been defamed must produce evidence supporting her claims before imposing on the First Amendment right to speak anonymously, and must further show that her interest in proceeding with the litigation outweighs the detractor's constitutional interest in remaining anonymous. Courts in eleven states and the District of Columbia now demand a showing beyond the filing of a facially valid complaint before a plaintiff can deprive an anonymous speaker of the First Amendment right to speak anonymously. So, too, do many federal courts. The issue was before this Court in *Fitch v. Doe*, 2005 ME 39, 869 A.2d 722 (2005), but the Court did not reach the First Amendment issue because it had not been preserved below.

Here, the Superior Court embraced the national consensus standard, holding that plaintiff had to make a legal and evidentiary showing that her claim had merit. This Court should uphold that ruling.[1]

INTEREST OF AMICI CURIAE

Public Citizen is a public-interest organization based in Washington, D.C. It has more than 400,000 members and supporters nationwide, more than 3000 of them

[1]The trial court also ruled that, because Gunning had failed to make a sufficient showing of merit in a prior subpoena proceeding in California, the doctrine of collateral estoppel barred her from obtaining a second bite at that apple through a motion to enforce a Maine subpoena. Amici take no position on the collateral estoppel issue.

in Maine. Since 1971, Public Citizen has encouraged public participation in civic affairs, and its lawyers have brought and defended many cases involving the free speech rights of those who participate in civic affairs. Public Citizen attorneys have represented Doe defendants and Internet forum hosts, and Public Citizen has appeared as amicus curiae, in cases involving subpoenas seeking to identify hundreds of authors of anonymous Internet messages .

2. The American Civil Liberties Union of Maine Foundation ("ACLU of Maine") is a nonprofit, nonpartisan organization dedicated to protecting the civil rights and civil liberties of the people of Maine and to extending those protections to individuals and groups that have traditionally been denied them. The ACLU of Maine was organized (as the Maine Civil Liberties Union Foundation) in 1968 as the Maine affiliate of the American Civil Liberties Union. The ACLU of Maine has a long history of involvement, both as amicus curiae and as direct counsel, in advocacy in support of freedom of speech, including the right to anonymous and pseudonymous speech. The proper resolution of this case is a matter of direct concern to the ACLU of Maine, and the ACLU of Maine hopes that its contribution will assist the Court in reaching its decision.

QUESTION PRESENTED

What procedures must a plaintiff follow, and what showing must she make,

when the plaintiff claims to have been wronged by anonymous speech and seeks to identify anonymous defendants?

STATEMENT

A. Background

Protection for the right to engage in anonymous communication is fundamental to a free society. Although this case involves anonymous communication both through an online blog and through a satirical newsletter distributed in hard copies in the town of Freeport, over the past two decades, disputes over subpoenas to identify anonymous speakers have most frequently arisen in the context of online speech (that was true in *Fitch v. Doe*, for example), and the standard the Court adopts will necessarily apply in such cases. We begin, therefore by setting this case against that background.

As electronic communications have become essential tools for speech, the Internet in all its forms—web pages, email, chat rooms, and the like—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 silly, profane, or brilliant, to all who choose to listen. As the Supreme Court explained in *Reno v. American Civil Liberties Union*, 521 U.S. 844, 853, 870 (1997):

> 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.
>
> [O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.

Knowing that people have personal interests in news developments, and that people love to share their views with anyone who will listen, many companies have organized outlets for the expression of opinions. For example, Yahoo! and Raging Bull host message boards for every publicly traded company where investors and other members of the public can post discussions about the company. Blogger, WordPress and TypePad give individuals the opportunity to create blogs of their own, on which bloggers can at no cost post discussions of current events, public figures, companies, or other topics while leaving it open for visitors to post their own comments. Other web sites, such as Yelp and Angie's List, have organized forums for consumers to share their experiences with local merchants. And still other sites are organized by industry, such as Trip Advisor, which hosts reviews of hotels, restaurants and tourist venues; 800Notes allows recipients of telemarketing calls can describe their experiences; RateMDs provides a forum for patients to review medical professionals; and Avvo enables clients and other lawyers to post reviews of lawyers.

The individuals who post messages on such web sites often do so under pseudonyms—similar to the old system of truck drivers using "handles" when they speak on their CB's. Nothing prevents an individual from using his real name, but, as inspection of the forum at issue here will reveal, many people choose nicknames that protect the writer's identity from those who disagree with him or her, and hence encourage the uninhibited exchange of ideas and opinions.

Many Internet forums have a significant feature that makes them very different from almost any other form of published expression. Subject to requirements of registration and moderation, any member of the public can use the forum to express his point of view; a person who disagrees with something that is said on a message board for any reason—including the belief that a statement contains false or misleading information—can respond to that statement immediately at no cost, and that response can have the same prominence as the offending message. To be sure, like a newspaper, such sites cannot be required to print responses to its criticisms. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974). But on many Internet forums (including those amici operate), companies and individuals can reply immediately to criticisms, giving facts or opinions to vindicate their positions, and thus, possibly, persuading the audience that they are right and their critics are wrong.

The record does not reveal whether the Wordpress blog here had the commenting function disabled. But even if a particular forum does not have a "reply" function, someone who disapproves of the content on one Internet site can easily, at no cost, create a rival site that expresses his or her own point of view.

To the extent that this case involves a hard-copy publication in addition to a web site, the foregoing considerations about Internet sites do not apply. And certainly if the plaintiff were a national figure, being criticized in a print publication disseminated by mail or on newsstands throughout the country, issuing an effective response could be more daunting. But to the extent that a newsletter is disseminated in a small community, it may not be difficult for advocates of a rival viewpoint to hand a rival newspaper or flyer around, or indeed to employee online technology to that end, thus enjoying an effective right of reply.

B. Facts and Proceedings Below

This case involves statements made about Marie Gunning in the *Freeport News as Viewed from a Crow's Nest* ("*Crow's Nest*"), whose masthead identifies itself as "a parody look at the news." The publication has been disseminated both in hard copy and through an Internet site that was located at http://freeportcrowsnest.com. Gunning's papers identify herself as a community activist, indeed as the president of some local community organizations, Gunning Brief at 7 n.1; she also stood

unsuccessfully as a candidate for Freeport's town council. *Id.* 5. In the aftermath of her political campaign, she was the target of several rude references in the *Crow's Nest*. Although amici have been unable to locate the publication online, the exhibits in the Appendix suggest that the online blog consisted of a series of images of the rather crudely-put-together hard copy edition of the newspaper. A. 26-69.

Gunning sued the anonymous author(s) of this publication, identifying the defendant as "John Doe," alleging that several of the references to her were defamatory, portrayed her in a false light, and intentionally inflicted emotional distress on her. She sought an award of damages. The statements about which Gunning complains include statements about her alleged efforts to block the *Crow's Nest*, A 3-4 ¶ 18-19, statements about the supposedly destructive aspects of her appearances before the town council, *id.* 4 ¶ 22, references to Gunning in connection with bipolar disorder and Prozac, *id.* 7 ¶ 34, and snide comparisons to various real-life and fictional characters, including Lindsay Lohan, Sarah Palin, Stella Kowalski (from *A Streetcar Named Desire*), the Wicked Witch of the West, and Katherina Minola (the title character in *The Taming of the Shrew*.) *Id.* 4-6 ¶¶20, 23, 24, 33.

In an effort to identify the Doe defendant, Gunning obtained a subpoena from the Superior Court for the County of San Francisco, where Automattic, the owner of the Wordpress blogging platform where the *Crow's Nest* was hosted. A. 104. Doe

moved in that court to quash the subpoena, and the parties exchanged briefs addressed to the question whether Gunning's tort claims could meet the First Amendment test established in *Krinsky v. Doe 6*, 72 Cal. Rptr.3d 231 (Cal. App. 2008), requiring that the proponent of a subpoena to identify an anonymous speaker must make both an evidentiary and a legal showing that she has potentially meritorious claims and thus ought to be allowed to deprive the speaker of her First Amendment right to speak anonymously. The San Francisco Superior Court held that each of the statements challenged in the complaint was a statement of opinion rather than a statement of provably-false fact, and hence that the First Amendment stood as an insuperable bar to success on the merits of Gunning's claim. A. 109. The California court went on to award attorney fees in favor of Doe. *Id.*

Rather than appealing the discovery ruling, as Gunning could have done under California's writ procedures, *Digital Music News LLC v. Superior Court*, 171 Cal. Rptr. 3d 799, 805 (2014), Gunning chose to initiate new proceedings in the Superior Court below to try to identify Doe. First, she moved for leave to serve Doe through Doe's counsel, Mr. Schutz, contending that because Mr. Schutz had been identified in the California proceedings as Doe's counsel, she could bypass the subpoena procedure altogether and bring Doe into the lawsuit by treating Mr. Schutz as Doe's agent for receipt of service. After the trial court rejected that argument, Gunning

served a subpoena on a Maine citizen whom she believed could identify Doe as being connected to the dissemination of the hard copies of the *Crow's Nest.* Both Simard, the third-party witness, and Doe moved to quash that subpoena. In the course of the briefing of that motion, Doe argued for the application of the *"Dendrite"* test, named after the leading case of *Dendrite Int'l v. Doe No. 3*, 342 N.J. Super. 134, 775 A.2d 756 (N.J. App. 2001), and the parties debated, much as they had done in the California court, whether the language of the *Crow's Nest* pertaining to Gunning contained statements of fact that were properly the subject of a defamation action, or whether the characterizations of Gunning represented hyperbole and parody that no reader would take seriously as statements of fact and which, as a result, the First Amendment would exclude from a defamation cause of action. But Doe also argued that, having addressed this very First Amendment argument in the proceedings before the California Superior Court, Gunning was not entitled to a second bite at that apple but was, rather collaterally estopped from rearguing the application of the First Amendment to her allegations. Rather than deciding whether *Dendrite* standards had been satisfied on the record then before the court, the trial judge decided that the outcome of the California litigation on that First Amendment issue was res judicata in Maine.

SUMMARY OF ARGUMENT

The Internet has the potential to be an equalizing force within our democracy, giving ordinary citizens the opportunity to communicate, at minimal cost, their views on issues of public concern to all who will listen. To help it fulfill that potential, courts have long recognized that full First Amendment protection applies to communications on the Internet, including the right to communicate anonymously, so long as the communication does not violate the law.

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 of those who have done no wrong to remain anonymous. Moreover, that balance must be struck before merits discovery has begun, because if the court orders the anonymous speaker identified, the defendant's First Amendment right to remain anonymous is irreparably destroyed.

In addition, suits against anonymous speakers are unlike most tort cases, where identifying an unknown defendant at the outset of the case is merely the first step toward establishing liability for damages. In a suit against an anonymous speaker, identifying the speaker gives an important measure of relief to the plaintiff because it enables the plaintiff to employ extra-judicial self-help measures to counteract both the speech and the speaker, and creates a substantial risk of harm to the speaker, who

not only loses the right to speak anonymously, but also may be exposed to efforts to restrain or punish his speech. For example, an employer might discharge a whistleblower, or a public official might use his powers to retaliate against the speaker; the plaintiff might also use knowledge of the critic's identity as a weapon in the political arena. There is evidence that access to identifying information to enable extra-judicial action may be the only reason some plaintiffs bring such suits (*see infra* 15-16).

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 granting the relief. The 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 simply by filing a complaint that purports to state an untested claim for relief under some tort or contract theory.

This Court will not be writing on an entirely clean slate. Because only a compelling interest is sufficient to warrant infringement of the free speech right to

remain anonymous, there is a developing national consensus, beginning with *Dendrite Int'l v. Doe No. 3*, 775 A.2d 756 (N.J. App. 2001), that a court faced with a demand for discovery to identify an anonymous Internet speaker so that he may be served with process should apply a multi-pronged test. Specifically, the court should (1) provide notice to the potential defendant and an opportunity to defend his anonymity; (2) require the plaintiff to specify the statements that allegedly violate his 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 his claims; and, in many jurisdictions (5) balance the equities, weighing the potential harm to the plaintiff from being unable to proceed against the harm to the defendant from losing his right to remain anonymous, in light of the strength of the plaintiff's evidence of wrongdoing. The court can thus ensure that a plaintiff does not obtain an important form of relief — identifying her 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.

Amici urge the Court to adopt the same test. Meeting these criteria can require time and effort on a plaintiff's part. However, everything that the plaintiff must do to meet this test, she 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 reasonably be able to

provide shortly after filing the complaint, without taking any discovery—and other cases show that plaintiffs with valid claims are easily able to meet the *Dendrite* test—the standard does not unfairly prevent the plaintiff with a legitimate grievance from achieving redress against an anonymous speaker.

Gunning argues against creating "new procedures" to address the protection of anonymous speakers who have been sued for defamation, but no new procedure is required or sought by the Doe defendant here. Gunning served a subpoena and the Doe opposed that subpoena citing the First Amendment as a basis for denying discovery, arguing that Gunning must show a valid basis for the underlying lawsuit, and present evidence in support of the claim, to overcome the First Amendment right to speak anonymously. Because the First Amendment supports a privilege against disclosure, there is nothing inconsistent with incorporating a First Amendment analysis into the decision whether to grant a protective order or a motion to quash, as court decisions typically do in Maine and federal courts when addressing other privileges.

ARGUMENT

I. APPLYING THE SAME STANDARDS AS EVERY OTHER STATE WHOSE APPELLATE COURTS HAVE DECIDED THE ISSUE, MAINE SHOULD REQUIRE A SHOWING OF MERIT ON BOTH THE LAW AND THE FACTS BEFORE A SUBPOENA TO IDENTIFY AN ANONYMOUS SPEAKER IS ENFORCED.

Appellate courts in eleven states plus the District of Columbia, as well as two federal appellate courts, have addressed the same question on which the decision in this case turns: what showing should a plaintiff have to make before she may be granted access to the subpoena power to identify an anonymous Internet user who has criticized the plaintiff? As shown below at pages 19 to 23, in **every** state where appellate courts that have resolved the question, it is not enough for the plaintiff to file a facially valid complaint. Rather, the plaintiff must make a factual showing, not just that the anonymous defendant has made harsh critical statements, but also that the statements are actionable **and** that there is an evidentiary basis for the elements of the claim. Some appellate courts have required, as well, an express balancing of the plaintiff's interest in prosecuting its lawsuit against the anonymous defendant's reasons for needing to stay anonymous. Amici urge the Maine courts to follow the same course.

A defamation plaintiff is uniquely in a position to know why the statement that it alleges to be false is, in fact, false and defamatory. Unlike, for example, a wrongful

discharge or personal injury plaintiff, who may need discovery to prove most of her case, the defamation plaintiff typically knows, before she decides to file suit, the evidence that would show the defendant's accusation to be false and defamatory, and she should have evidence establishing injury. There is typically no reason why, at the outset of a case, someone about whom false statements have been made cannot present such evidence.

A. The Constitution Limits Compelled Identification of Anonymous Internet 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); *Fitch v. Doe*, 2005 ME 39, ¶ 26, 869 A.2d 722, 729 (2005); *Yes for Life Political Action Comm. v. Webster*, 74 F. Supp. 2d 37, 42 (D. Me. 1999). *See also NLRB v. Midland Daily News*, 151 F.3d 472, 475 (6th Cir. 1998) (recognizing that discovery to identify anonymous advertisers engaged in lawful commercial speech could chill speech). 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 U.S. at 341-342, 356 (emphasis added).

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). Several courts have specifically upheld the right to communicate anonymously over the Internet. *Independent Newspapers v. Brodie*, 966 A.2d 432 (Md. 2009); *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); *Dendrite v. Doe*, *supra*.

Internet speakers may choose to speak anonymously for a variety of reasons. They may wish to avoid having their views stereotyped according to their racial,

ethnic or class characteristics, or their gender. They may be associated with an organization but want to express an opinion of their own, without running the risk that, despite the standard disclaimer against attribution of opinions to the group, readers will assume that the group feels the same way. 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.

Although the Internet allows individuals to speak anonymously, it creates an unparalleled capacity to monitor every speaker and to discover his or her identity. Because of the Internet's technology, any speaker who sends an e-mail or visits a website leaves an electronic footprint that, if saved by the recipient, starts a path that can be traced back to the original sender. *See* Lessig, *The Law of the Horse: What Cyber Law Might Teach*, 113 Harv. L. Rev. 501, 504-505 (1999). Thus, anybody with enough time, resources and interest, if coupled with the power to compel disclosure of the information, can learn who is saying what to whom. Consequently, to avoid the Big Brother consequences of a rule that enables any company or political figure to identify its critics, the law provides special protections for anonymity on the Internet. *E.g.*, Lidsky & Cotter, *Authorship, Audiences and Anonymous Speech*, 82 Notre Dame L. Rev. 1537 (2007).

Indeed, in a number of cases, plaintiffs have succeeded in identifying their critics and then sought no further relief from the court. Thompson, *On the Net, in the Dark,* 1 California Law Week, No. 9, at 16, 18 (1999). Mere identification of anonymous critics may be all that some plaintiffs desire to achieve through the lawsuit. An early advocate of using discovery procedures to identify anonymous critics has urged corporate executives to use discovery first, and to decide whether to sue for libel only after the critics have been identified and contacted privately.[2] 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"; they also urge clients to decide whether it is worth pursuing a lawsuit only after finding out who the defendant is. Eisenhofer & Liebesman, *Caught by the Net*, 10 Business Law Today No. 1 (Sept.-Oct. 2000), at 40. Some companies have followed this advice *See Swiger v. Allegheny Energy*, 2006 WL 1409622 (E.D. Pa. May 19, 2006), *aff'd*, 540 F.3d 179 (3rd Cir. 2008) (company filed Doe lawsuit, obtained identity of employee who criticized it online, fired the employee, and dismissed the lawsuit without obtaining any judicial remedy other than the removal of anonymity). Even the

[2]Fischman, *Your Corporate Reputation Online*, www.fhdlaw.com/html/corporate_reputation. htm; Fischman, *Protecting the Value of Your Goodwill from Online Assault*, www.fhdlaw.com/html/ bruce_article.htm.

pendency of a subpoena may have the effect of deterring other members of the public from discussing the plaintiff, a further impact on protected speech

Companies that make pornographic movies have brought mass copyright infringement lawsuits against hundreds of anonymous Internet users at a time, without any intention of going to trial, but hoping that embarrassment at being subpoenaed and then publicly identified as defendants in such cases will be enough to induce them to pay thousands of dollars in settlements. *AF Holdings, LLC v. Does 1-1058*, 752 F.3d 990, 992 (D.C. Cir. 2014); *Mick Haig Productions v. Doe*, 687 F.3d 649, 652 & n.2 (5th Cir. 2012); *Patrick Collins v. Doe 1*, 288 F.R.D. 233 (E.D.N.Y. 2012). Indeed, some pornographic films are now being made not to be sold, but to be used as the basis for subpoenas to identify alleged downloaders who can then be pressured to "settle." *On The Cheap, LLC v. Does 1–5011*, 280 F.R.D. 500, 504 n.6 (N.D. Cal. 2011). Amici do not suggest that Gunning has brought this lawsuit to shake down anybody, but the rules governing subpoenas must be crafted with the recognition that some plaintiffs serving such subpoenas will not be properly motivated.

The fact that plaintiff Gunning is a private individual does not exempt her subpoena from First Amendment scrutiny; she 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. That is why, for example, an action for damages for defamation, even when brought by an individual, must satisfy First Amendment scrutiny, *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 349 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964), and it is why a request for injunctive relief, even at the behest of a private party, is similarly subject to constitutional scrutiny. *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Shelley v. Kraemer*, 334 U.S. 1 (1948). Just as a discovery order in civil litigation can violate privileges created by the Fifth Amendment, *Collett v. Bither*, 262 A.2d 353, 358 (Me. 1970), so may a discovery order implicate First Amendment privileges.

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. In a related context, courts have recognized the need to safeguard the First Amendment interests of journalists through the recognition of a qualified privilege against civil discovery directed to third-party witnesses seeking to identify their confidential sources, *Bruno & Stillman v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980); at the very least, courts will often bifurcate discovery so that the defendant has an opportunity to get

the lawsuit dismissed before facing discovery to identify such sources. *Id.; Pan Am Sys. v. Atl. Ne. Rails & Ports*, 804 F.3d 59, 63 (1st Cir. 2015). This Court has cited *Bruno v. Stillman* with approval, including its statement that "[C]ourts must balance the potential harm to the free flow of information that might result against the asserted need for the requested information," *In re Letellier*, 578 A.2d 722, 726 (Me. 1990), although the Court held that, when the subpoena has been issued by a grand jury, the "obligation of all citizens to give relevant **evidence regarding criminal conduct**" will generally outweigh the interest in confidentiality. *Id.* (emphasis added). But greater protection is provided for First Amendment interests when it is a civil subpoena that is at issue. *Levesque v. Doocy*, 247 F.R.D. 55, 57 (D. Me. 2007).

As one court said in refusing to order identification of anonymous Internet speakers whose identities were allegedly relevant to the defense against a shareholder derivative suit, "If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights." *Doe v. 2theMart.com*, 140 F. Supp.2d 1088, 1093 (W.D. Wash. 2001). As explained in *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999),

> People are permitted to interact pseudonymously and anonymously with each other so long as those acts are not in violation of the law. This ability to speak one's mind without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate . . . . **People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identities**.
>
> (emphasis added).

B. In Every State Whose Appellate Courts Have Resolved the Issue, Courts Have Required a Detailed Legal and Evidentiary Showing for the Identification of John Doe Defendants Sued for Criticizing the Plaintiff.

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 A2d at 457.

Court have drawn on the media's privilege against revealing sources in civil cases to enunciate a similar rule protecting against the identification of anonymous

Internet speakers. The leading decision on this subject, *Dendrite v. Doe*, *supra*, established a five-part standard that became a model followed or adapted throughout the country:

> **1. Give Notice:** Courts require the plaintiff (and sometimes the Internet Service Provider) to provide reasonable notice to the potential defendants and an opportunity for them to defend their anonymity before issuance of any subpoena.
>
> **2. Require Specificity:** Courts require the plaintiff to allege with specificity the speech or conduct that has allegedly violated its rights.
>
> **3. Ensure Facial Validity:** Courts review each claim in the complaint to ensure that it states a cause of action upon which relief may be granted based on each statement and against each defendant.
>
> **4. Require An Evidentiary Showing:** Courts require the plaintiff to produce evidence supporting each element of its claims.
>
> **5. Balance the Equities:** Weigh the potential harm (if any) to the plaintiff from being unable to proceed against the harm to the defendant from losing the First Amendment right to anonymity.
>
> *Id.*, 775 A.2d at 760-61.

The fifth part of the *Dendrite* test has not been adopted by all courts that follow *Dendrite*. In Delaware, a trial judge had decided that a town councilman who sued over statements attacking his fitness to hold office could identify the anonymous posters so long as he was not proceeding in bad faith and could establish that the statements about him were actionable because they might have a defamatory meaning,

Cahill v. John Doe-No. One, 879 A.2d 943 (Del. Super.), *rev'd sub nom. Doe v. Cahill*, 884 A.2d 451 (Del. 2005)—essentially the same test for which Gunning argues here. The Delaware Supreme Court reversed, ruling that a plaintiff must put forward evidence sufficient to establish all elements of a defamation claim that ought to be within his control without discovery, including evidence that the statements are false, but that court did not balance the equities. *Doe v. Cahill*, 884 A.2d 451. Although amici believe that the Court should adopt the balancing test as the fifth step, the first four parts of the test represent the minimum protections required by the First Amendment, and that therefore have been adopted by all states whose appellate courts have finally resolved the issue. Maine should do no less.

The following state appellate courts have endorsed the *Dendrite* test, including the final balancing stage:

> *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App. 2007), where a private company sought to identify the sender of an anonymous email message who had allegedly hacked into the company's computers to obtain information that was conveyed in the message. Directly following the *Dendrite* decision, and disagreeing with the Delaware Supreme Court's rejection of the balancing stage, the court analogized an order requiring identification of an anonymous speaker to a preliminary injunction against speech. The Court called for the plaintiff to present evidence sufficient to defeat a motion for summary judgment, followed by a balancing of the equities between the two sides.
>
> *Independent Newspapers v. Brodie*, 966 A.2d 432 (Md. 2009), where the court required notice to the Doe, articulation of the precise defamatory

words in their full context, a prima facie showing, and then, "if all else is satisfied, balanc[ing] the anonymous poster's First Amendment right of free speech against the strength of the prima facie case of defamation presented by the plaintiff and the necessity for disclosure of the anonymous defendant's identity." *Id.* at 457.

Mortgage Specialists v. Implode-Explode Heavy Industries, 999 A.2d 184 (N.H. 2010), where a mortgage lender sought to identify the author of comments saying that its president "was caught for fraud back in 2002 for signing borrowers names and bought his way out." The New Hampshire Supreme Court held that "the *Dendrite* test is the appropriate standard by which to strike the balance between a defamation plaintiff's right to protect its reputation and a defendant's right to exercise free speech anonymously." *Id.* at 193.

Pilchesky v. Gatelli, 12 A.3d 430 (Pa. Super. 2011), which held that a city council chair had to meet the *Dendrite* test before she could identify constituents whose scabrous accusations included selling out her constituents, prostituting herself after having run as a reformer, and getting patronage jobs for her family.

In re Indiana Newspapers, 963 N.E.2d 534 (Ind. App. 2012), where the recently retired head of a local charity sought to identify an anonymous individual who had commented on a newspaper story about the financial problems of the charity by asserting that the missing money could be found in the plaintiff's bank account; the court adopted *Dendrite*'s balancing approach, as discussed in *Mobilisa*, and remanded with instruction for the trial court to apply it.

Several other state appellate courts have followed a *Cahill*-like summary judgment standard without express balancing:

Krinsky v. Doe 6, 72 Cal. Rptr. 3d 231 (Cal. App. 2008), where the appellate court applied *Cahill* and hence reversed a trial court decision allowing an executive to learn the identity of several online critics who allegedly defamed her by such references as "a management consisting

> of boobs, losers and crooks."
>
> *In re Does 1-10*, 242 S.W.3d 805 (Tex. App. 2007), which applied *Cahill* and hence reversed a decision allowing a hospital to identify employees who had disparaged their employer and allegedly violated patient confidentiality through posts on a blog.
>
> *Solers v. Doe*, 977 A.2d 941 (D.C. 2009), where the court held that a government contractor could identify an anonymous whistleblower who said that plaintiff was using unlicensed software if it produced evidence that the statement was false. The court adopted *Cahill* and expressly rejected *Dendrite*'s balancing stage.
>
> *Doe v. Coleman*, 436 S.W.3d 207, 211 (Ky. App. 2014): The Kentucky Court of Appeals granted a writ or prohibition, overturning a trial court order that refused to quash a subpoena seeking to identify anonymous speakers who had criticized the chairman of the local airports board, because the trial court had not required the plaintiff to set forth a prima facie case for defamation under the summary judgment standard.

Most recently, the Washington Court of Appeals endorsed the evidence requirement, while putting off for another day the question whether to have a balancing stage, noting that the record before the court contained no information to which the balancing stage could be applied. *Thomson v. Doe*, 189 Wash. App. 45, 356 P.3d 727 (Wash. App. 2015).

Illinois has found it unnecessary to apply the First Amendment to a petition for pre-litigation discovery because the state's rules already require a verified complaint, specification of the defamatory words, determination that a valid claim was stated, and notice to the Doe. *Hadley v. Doe*, 34 N.E.3d 549, 556 (2015); *Stone v. Paddock*

Pub. Co., 961 N.E.2d 380 (Ill. App. 2011); *Maxon v. Ottawa Pub. Co.*, 929 N.E.2d 666 (Ill. App. 2010). Two different panels of the Michigan Court of Appeals have addressed the question. *Ghanam v. Does*, 845 N.W.2d 128 (2014), and *Thomas Cooley Law School v. Doe 1*, 833 N.W.2d 331 (2013). The reasoning of the two panels is inconsistent: the first panel (in *Cooley*), with one judge dissenting, concluded that it was unnecessary to create a new standard under the First Amendment because First Amendment considerations could be applied through existing protective order procedure under the Michigan Rules; the second panel agreed with the *Cooley* dissenter that *Dendrite* represented the right approach, but felt precedent-bound to create a special exception to the rule about using Michigan rules to apply on the facts of that case. A third case is pending before the Michigan Court of Appeals in which the court is being asked to reconcile these two precedents. *Sarkar v. Pupbeer*, Case Nos. 326667 and 326691. Finally, in *Yelp, Inc. v. Hadeed,* 770 S.E.2d 440 (Va. 2015), *rev'g* 62 Va.App. 678, 752 S.E.2d 554 (2014), a decision of an intermediate court of appeals to follow a special Virginia procedural statute about the identification of anonymous speakers because the panel felt that the law was not unconstitutional; that ruling was reversed on the jurisdictional grounds.

Many federal courts have approved the application of heightened standards for the identification of anonymous speakers sued for alleged defamation or other torts.

Only two such cases have resulted in reported appellate decisions. First, *In re Anonymous Online Speakers,* 611 F.3d 653, 661 (9th Cir. 2010), *revised opinion adopted on rehearing*, 661 F.3d 1168 (9th Cir. 2011), where in the course of denying petitions for mandamus relief, the court said that "imposition of a heightened standard is understandable" in a case involving political speech, but that when the Doe defendants are commercial actors tearing down a competitor, less protection for anonymity is appropriate. Similarly, in a case involving the infringement of large numbers of copyrighted sound recordings, the Court of Appeals for the Second Circuit upheld an order that the ISP identify the anonymous defendant because the plaintiff had made a concrete prima facie showing of infringement, including the submission of an affidavit, sworn on personal knowledge, that identified specific copyrighted sound recordings and specified the means by which the affiant had identified Doe's Internet Protocol address as having been connected with the copying of those recordings. *Arista Records v. Doe 3*, 604 F.3d 110 (2d Cir. 2010).

Federal district courts have repeatedly followed *Cahill* or *Dendrite*. *E.g.*, *Highfields Capital Mgmt. v. Doe*, 385 F. Supp.2d 969, 976 (N.D. Cal. 2005) (required 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*, 2016 WL 912192, at *5 (D. Minn. Mar. 7, 2016); (drawing test from

Dendrite and *Cahill*); *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*, 2011 WL 1629572 (D. Nev. Apr. 27, 2011) (followed *Highfields Capital)*; *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*, 2006 WL 2091695 (D. Ariz. July 25, 2006) (court used a five-factor test drawn from *Cahill*, *Dendrite* and other decisions); *In re Baxter*, 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*, 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).

C. Arguments Against Requiring Civil Plaintiffs to Make an Evidentiary and Legal Showing Before Imposing on the First Amendment Right to Speak Anonymously Are Unpersuasive.

Plaintiffs who seek to identify Doe defendants often suggest that requiring the presentation of evidence to get enforcement of a subpoena to identify Doe defendants is too onerous a burden, because plaintiffs who can likely succeed on the merits of their claims will be unable to present such proof at the outset of their cases. Quite to the contrary, however, many plaintiffs succeed in identifying Doe defendants in jurisdictions that follow *Dendrite* and *Cahill*. *E.g.*, *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. 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. Moreover, this argument fails to acknowledge the fact that an order identifying the anonymous defendant is a form of relief, relief that can injure the defendant (by exposing the defendant to retaliation at the hands of the plaintiff and/or her supporters), and relief that can benefit the plaintiff by chilling future criticism as well as by identifying critics so that their dissent can be more easily addressed. Courts do not and should not give relief without proof.

Gunning takes the unusual approach of arguing that the right to speak

anonymously is weak at best, pointing to statements in *McIntyre v. Ohio Elections Commission* and its progeny indicating that the right to speak anonymously can be overcome by certain government interests. Gunning Br. at 35-38. True it is that there is no absolute right to speak anonymously, nor is any other form of protected speech absolute—protection can be overcome in certain instances. But Gunning cannot overcome *McIntyre's* plain statement that "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.**" 514 U.S. at 342 (emphasis added). Nor does Gunning address *Fitch v. Doe*, 2005 ME 39, ¶ 26, 869 A.2d 722, 729 (2005), where the Court, although postponing to another day the question of how to apply the First Amendment to subpoena cases like this one, did acknowledge the need to address such issues in light of "the recognized right to anonymous speech."

Plaintiffs seeking such discovery often argue as well that there is nothing to balance on the anonymous defendant's side of the scale because defamation is outside the First Amendment's protection and the speech at issue in this case is defamatory. But this argument begs the question, and courts in other states, facing precisely the same argument, have understood that such arguments are fundamentally unsound. Indeed, the Supreme Court has held that even in the defamation context, false speech

can be protected by the First Amendment unless the speech is shown to have been knowingly or recklessly false. *United States v. Alvarez*, — U.S. —, 132 S. Ct. 2537 (2012). At this point, Gunning has made only allegations, and the question is what showing a plaintiff should have to make before an anonymous critic is stripped of that anonymity by an exercise of government power.

II. FIVE STEPS MUST BE FOLLOWED BEFORE IDENTIFICATION OF ANY JOHN DOE SPEAKER MAY BE ORDERED.

For amici, the most important aspect of the decision that the Court will make in this case will be the selection of the legal standard to govern subpoenas to identify anonymous defendants accused of wrongful speech. Recognizing that the Court may choose to use this appeal as a vehicle to address the appropriate standard more broadly, as a guide to the lower courts, we address below the importance and application of each of the component parts of the *Dendrite* / *Cahill* standard.

A. Courts Should First Endeavor to Ensure Doe Defendants Get the Best Possible Notice of the Attempt to Subpoena Their Identities and a Fair Opportunity to Oppose The Subpoena.

The first requirement in the *Dendrite* / *Cahill* consensus approach is for the plaintiff to notify the Doe of its efforts to take away his anonymity. Although apparent that both the Doe who publishes *Crow's Nest* online and the Doe who prepares its contents know about this subpoena proceeding, we begin by discussing

the notice issue to urge the Court to craft a notice requirement to guide the lower courts in future cases.

When a court receives a request for permission to subpoena an anonymous Internet poster, it should require the plaintiff to 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 Insurance Co. v. Seescandy.com*, 185 F.R.D. at 579. Thus, in *Dendrite*, 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. Indeed, notice and an opportunity to defend is a fundamental requirement of constitutional due process. *Jones v. Flowers*, 547 U.S. 220 (2006). Although mail or personal delivery is the most common method of providing notice that a lawsuit has been filed, there is ample precedent for posting where there is concern that mail notice may be ineffective, such as when action is being taken against real property and notice is posted on the door of the property. *Id.* at 235. In the Internet context, posting on the Internet forum

where the allegedly actionable speech occurred is often the most effective way of reaching the anonymous defendants, at least if there is a continuing dialogue among participants, and the Court is urged to follow the *Dendrite* example by requiring posting in addition to other means that are likely to be effective.

In many cases, posting will not be the only way of giving notice to the Doe. If a subpoena is sent to the ISP that provides Internet access to the Doe, then the ISP will commonly have a mailing address for its customer. Or if the host of the web site requires registration as a condition of posting, and requires the provision of an email address as part of registration, then sending a notice to that email address can be an effective way of providing notice.[3]

The industry standard is to provide two weeks or fifteen days' notice, although a Virginia statute requires twenty-five days. Va. Code §§ 8.01-407.1(1) and (3). The Cyberslapp Coalition proposed a model standard for ISP's that would allow up to thirty days for Does to move to quash. http://cyberslapp.org/about/page.cfm?

[3]To be sure, such notice is not always effective, because Internet users sometimes adopt new email addresses, and either drop or stop using their old addresses; they do not always think to notify all of the web sites where they have given their old addresses. For example, in the 2009 *Brodie* case in Maryland, Public Citizen's client, Independent Newspapers, gave email notice that it had received a subpoena to identify the owners of certain pseudonyms; one of those owners did not receive the message and, in fact, did not learn that there were proceedings to identify her until she read an account of the case in the *Washington Post* that mentioned her pseudonym, which had figured in the oral argument.

pageid=6**.** The time allowed for the Doe to oppose the subpoena should take into consideration whether the controversy is purely a local one; if participation is national, the time for notice should take into consideration not just the time needed to find counsel where the Doe resides, but also to find local counsel in the jurisdiction where a motion to quash would have to be filed. The Virginia statute requires plaintiff to serve its entire showing of a meritorious case on the ISP along with the subpoena, thirty days before the date when compliance is due, and requires the ISP to furnish a copy of plaintiff's packet to the Doe within five days after that. *Id.* This enables the Doe to prepare a motion to quash without having to contact plaintiff. Indeed, lawyers who represent Does often find that plaintiff's counsel does not cooperate by providing its basis for seeking identification. The Virginia statute avoids that problem.

B. The Plaintiff Should Be Required to Plead Verbatim the Allegedly Actionable Words and to Show the Context in Which They Were Used.

The qualified privilege to speak anonymously requires a court to review the plaintiff's claims to ensure that he does, in fact, have a valid reason for piercing each speaker's anonymity. Thus, the court should require the plaintiff to set forth the exact statements by each anonymous speaker that are alleged to have violated his rights. As one court has said, "The law requires the very words of the libel to be set out in

the declaration in order that the court or judge may judge whether they constitute a ground of action." *Royal Palace Homes v. Channel 7 of Detroit*, 495 N.W.2d 392 (Mich. App. 1992) (emphasis omitted. For example, the court can assess whether the language charged as defamatory is an assertion of fact, which can be true or false and hence subject to a defamation action, or only a rhetorical statement of opinion, which is immune from litigation because, in our system of free speech, "there is no such thing as a false idea." *Gertz v. Welch*, 418 U.S. 323, 339 (1974). The court can also ascertain whether the statement was "of and concerning" the plaintiff, as both libel law and the First Amendment require, *Rosenblatt v. Baer*, 383 U.S. 75, 83 (1966), whether the defamation action had been filed within the statute of limitations, and other matters that might bar the claim on the face of the complaint. Many state and federal courts require that defamatory words be set forth verbatim in a complaint for defamation. *E.g.*, *Asay v. Hallmark Cards*, 594 F.2d 692, 699 (8th Cir. 1979).

C. The Court Should Decide Whether the Anonymous Statements Are Actionable.

Even before *Dendrite* and *Cahill* changed the legal landscape in this area of the law by holding that plaintiffs had to present evidence in support of their claims, the trial courts that had addressed the proper legal standard for subpoenas to identify anonymous speakers had uniformly held that plaintiffs must show that they have

alleged a valid cause of action. *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999); *In re Subpoena Duces Tecum to AOL*, 52 Va. Cir. 26 (2000), *rev'd sub nom. AOL v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (2001). For example, in a defamation case, the plaintiff must have brought a claim that is timely, is based on statements of and concerning the plaintiff, and is based on statements that make accusations of fact rather than assertions of opinion that are not actionable consistent with the First Amendment. In the latter respect, for example, statements might not be actionable because they are expressions of opinion based on disclosed fact. Restatement (Second) of Torts, § 566; *Fortier v. IBEW Local 2327*, 605 A.2d 79, 80 (Me. 1992). Or, the statements might have been "clear hyperbole, rhetoric, or figurativisms [which], like clear statements of opinion, are as a matter of law not actionable." *Haworth v. Feigon*, 623 A.2d 150, 156 (Me. 1993); *see also Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724, 727 (1st Cir. 1992) (First Amendment protects "loose, figurative, or hyperbolic language which would negate the impression that a factual statement was being made"). The question of whether a statement is an actionable one of fact, or a constitutionally protected expression of opinion, is an issue of law decided by the courts. *Haworth*, 623 A.2d at 156; *Bakal v. Weare*, 583 A.2d 1028, 1030 (Me. 1990).

Gunning argues that it is unfair to make plaintiffs satisfy this test because, she

contends, such determinations must be made based on the context of the statements, which, she says, is difficult to assess when the complaint is first filed. Gunning Br. 15-16, 40-42. Gunning's argument is unpersuasive because both sides are able to submit information showing the context of the allegedly actionable statements. Gunning, for example, attached several complete issues of the *Crow's Nest* as exhibits to her complaint. Indeed, in the papers both in the court below, and in the California Superior Court, *see* A. 105-106, the parties debated at some length whether the allegedly actionable sentences, in their context, were expressions of opinion or statements of fact. Moreover, Gunning never shows how the fact that this debate took place at an early stage of the case prevented her from making her best arguments on this issue.

Moreover, in subpoena cases in other jurisdictions, courts have had no difficulty considering the context as well as the statements themselves in deciding whether the plaintiff had a realistic cause of action. In *Cahill*, for example, the Delaware Supreme Court determined that reference to a town councilman's "obvious signs of mental deterioration" and calling him "paranoid" were, in the context of the community chat room where they appeared, simply hyperbolic ways of expressing general disapproval of his speaking manner. 884 A.2d at 467. Similarly, in *Highlands Capital*, the court said, "There is so much obvious garbage, . . . so much irreverence

and jocularity in this venue, so much mockery, so much venting, so much indecency and play," that no reasonable viewer would take statements there as serious statements of fact. 385 F. Supp.2d at 978. By contrast, reference to a plaintiff as a "Sandusky waiting to be exposed," with specific reference to the view that plaintiff had of an elementary school, could not be taken as figurative in light of the context. *Hadley v. Doe*, 34 N.E.3d at 559 (citing Penn State football program scandal).

D. The Plaintiff Should Be Required to Present Evidence In Support of The Claims.

If the Court concludes that at least one statement is objectively verifiable and hence actionable, no person should be subjected to compulsory identification through a court's subpoena power unless the plaintiff produces sufficient evidence supporting each element of its cause of action to show that it has a realistic chance of winning a lawsuit against that defendant. This requirement, which has been followed by every federal court and every state appellate court that has addressed the standard for identifying anonymous Internet speakers, prevents a plaintiff from being able to identify his critics simply by filing a facially adequate complaint. In this regard, plaintiffs often claim that they need to identify the defendants simply to proceed with their case. However, relief is generally not awarded to a plaintiff unless and until the plaintiff comes forward with evidence in support of his claims, and the Court should

recognize that identification of an otherwise anonymous speaker is a major form of relief in cases like this. Requiring actual evidence to enforce a subpoena is particularly appropriate where the relief itself may undermine, and thus violate, the defendant's First Amendment right to speak anonymously, in service of a cause of action that is fatally deficient from the outset.

To address this potential abuse, the Court should borrow by analogy the holdings of cases involving the disclosure of anonymous sources. Those cases require a party seeking discovery of information protected by the First Amendment to show that there is reason to believe that the information sought will, in fact, help its case. *In re Petroleum Prod. Antitrust Litig.*, 680 F.2d 5, 6-9 (2d Cir. 1982); *Richards of Rockford v. PGE*, 71 F.R.D. 388, 390-391 (N.D. Cal. 1976). In effect, the plaintiff should be required to meet the summary judgment standard of creating genuine issues of material fact on all issues in the case before it is allowed to obtain their identities. *Cervantes v. Time*, 464 F.2d 986, 993-994 (8th Cir. 1972). "Mere speculation and conjecture about the fruits of such examination will not suffice.' *Id.* at 994.

If the plaintiff cannot come forward with concrete evidence sufficient to prevail on all elements of his case on subjects that are based on information within his own control, there is no basis to breach the anonymity of the defendants. *Bruno &*

Stillman v. Globe Newspaper Co., 633 F.2d 583, 597 (1st Cir. 1980); *Southwell v Southern Poverty Law Center*, 949 F. Supp. 1303, 1311 (W.D. Mich. 1996). Similarly, if the evidence that the plaintiff is seeking can be obtained without identifying anonymous speakers or sources, the plaintiff is required to exhaust these other means before seeking to identify anonymous persons. *Zerilli v Smith*, 656 F.2d 705, 714 (D.C. Cir. 1981) ("[A]n alternative requiring the taking of as many as 60 depositions might be a reasonable prerequisite to compelled disclosure"). The requirement that there be sufficient evidence to prevail against the speaker, and a sufficient showing of the exhaustion of alternate means of obtaining the plaintiff's goal, to overcome the defendant's interest in anonymity is part and parcel of the requirement that disclosure be "necessary" to the prosecution of the case, and that identification "goes to the heart" of the plaintiff's case. If the case can be dismissed on factual grounds that do not require identification of the anonymous speaker, it can scarcely be said that such identification is "necessary."

Applying this requirement to a plaintiff who seeks to deprive the defendant of the right to keep her anonymity is similar to the approach that many courts take when they bifurcate proceedings before deciding whether to compel the identification of anonymous sources, *supra* at 15. If the plaintiff cannot show a prima facie case, there is no reason to compel the identification of the anonymous defendant, just as there

would be no reason to compel the identification of a journalist's source if a defamation defendant could get summary judgment on an issue such as falsity.

The extent to which a plaintiff who seeks to compel disclosure of the identity of an anonymous critic should be required to offer proof to support each of the elements of his claims at the outset of his case varies with the nature of the element. On many issues in suits for defamation or disclosure of inside information, several elements of the plaintiff's claim will ordinarily be based on evidence to which the plaintiff, and often not the defendant, is likely to have easy access. For example, the plaintiff is likely to have ample means of proving that a statement is false (in a defamation action) or rests on confidential information (in a suit for disclosure of inside information). Similarly, when injury or damages is part of the prima facie case, the plaintiff should have ready access to information showing the existence of damages before the suit is filed. Thus, it is ordinarily proper to require a plaintiff to present proof of such elements of its claim as a condition of enforcing a subpoena for the identification of a Doe defendant. Other common issues in defamation cases would be normally be hard for a plaintiff to establish, such as the actual malice that a defamation plaintiff must prove if he or she is a public figure; consequently, it would normally be inappropriate to require the plaintiff establish actual malice before identifying the defendant. *E.g.*, *Pilchesky v. Gatelli*, 12 A.3d at 441 (2011), quoting

Cahill, 884 A.2d at 464; *Solers v. Doe*, 977 A.2d at 958.

E. The Court Should Adopt *Dendrite*'s Final Stage, Balancing The Plaintiff's Interest in Avoiding Criticism and the Does' First Amendment Right to Remain Anonymous.

Where a Court concludes that the plaintiff has submitted evidence sufficient to establish a prima facie case of defamation against each Doe defendant,

> the 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).

Just as the Missouri Court of Appeals approved such balancing in a reporter's source disclosure case, *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.

> The application of these procedures and standards must be undertaken and analyzed on a case-by-case basis. The guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue.
>
> *Dendrite,* 775 A.2d at 760-761.

See also Mobilisa v. Doe, 170 P.3d at 720; *Highfields Capital Mgmt. v. Doe*, 385 F. Supp.2d at 976.

The adoption of a standard comparable to the test for grant or denial of a preliminary injunction, considering the likelihood of success and balancing the equities, is particularly appropriate because an order of disclosure is an injunction – and not even a preliminary one at that. A refusal to quash a subpoena for the name of an anonymous speaker causes irreparable injury, because once a speaker's name is published to the world, she loses her anonymity and can never get it back. Moreover, any violation of an individual speaker's First Amendment rights constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373-374 (1976). In some cases, identification of the Does may expose them to significant danger of extra-judicial retaliation. To the extent that the defendant can show that such dangers are present in her case, courts can employ the balancing part of the *Dendrite* test to weigh those considerations in the balance.

But the adoption of a balancing approach can favor plaintiffs as well as

anonymous defendants. For example, several courts have held that, although anonymous defendants accused of copyright infringement could be engaged in speech of a sort, the First Amendment value of offering copyrighted recordings for download is low, and the likely impact of being identified as one of several hundred alleged infringers is also likely low. *Call of the Wild Movie v. Does 1-1,062,* 770 F. Supp.2d 332, 350 n.7 (D.D.C. Mar. 22, 2011); *Sony Music Entertainment v. Does 1-40*, 326 F. Supp.2d 556, 564 (S.D.N.Y. 2004); *London-Sire Records v. Doe 1*, 542 F. Supp.2d 153, 164 (D. Mass. 2008). Hence, such courts accept a lower level of evidence to support the prima facie case of infringement. *Call of the Wild*, 770 F Supp2d at 351 nn.7, 8. It has been argued that these cases represent a copyright exception to the *Dendrite* rule, but other courts have, more properly, held that the cases turn on the nature of the speech at issue. *Art of Living Foundation v Does 1-10*, 2011 WL 5444622 (N.D. Cal. Nov. 9, 2011). Similarly, in *In Re Anonymous Online Speakers*, 661 F.3d 1168, 1176-1177 (9th Cir, 2011), the court of appeals said that when a Doe lawsuit is filed over commercial speech, the lesser protection that the First Amendment affords for commercial speech should be reflected in a more permissive approach to identifying the defendant. Although these courts do not explicitly invoke the balancing stage of *Dendrite*, they implicitly do so.

On the other side of the balance, courts should consider the strength of the

plaintiff's case and his interest in redressing the alleged violations. In this regard, 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.

Denying a motion to compel identification of the Doe, based on either lack of sufficient evidence or balancing the equities, would not compel dismissal of the complaint. If the reason why discovery is denied is insufficiency of the evidence rather than invalidity of the legal claims, the plaintiff retains the opportunity to renew his motion after submitting more evidence.

* * *

In sum, this Court should uphold the trial court's decision to apply the *Dendrite* standard. To hold otherwise would put Maine at odds with the approach of the other states whose appellate courts have finally resolved addressed this issue. Amici urge the Court to employ the *Dendrite* analysis in deciding whether to employ judicial power to deny Doe's First Amendment right to speak anonymously, addressing both the collateral estoppel issue and, if need be, the showings made by the parties about the merit or lack of merit of Gunning's legal claims

CONCLUSION

The Court should apply *Dendrite* in deciding whether to affirm the order below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of April, 2012, a copy of the foregoing brief was served by first-class mail, postage pre-paid, on counsel for plaintiff-appellant as follows:

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