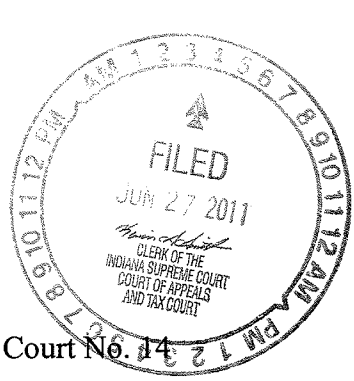

IN THE INDIANA COURT OF APPEALS

No. 49A02-1103-PL-00234

IN RE INDIANA NEWSPAPERS INC., d/b/a THE INDIANAPOLIS STAR,	)
Appellant-Non-Party,	) Appeal from Marion Superior Court No. 14
JEFFREY M. MILLER, CYNTHIA S. MILLER,	) Honorable S.K. Reid
Appellees- Plaintiffs,	) Trial Court Cause No. 49D14-1003-PL-014761
v.	
JUNIOR ACHIEVEMENT OF CENTRAL INDIANA, INC., JENNIFER BURK, Individually and in her Official Capacity; CENTRAL INDIANA COMMUNITY FOUNDATION, INC.; BRIAN PAYNE, Individually and in his Official Capacity	
Appellees-Defendants.	

BRIEF OF PUBLIC CITIZEN, INC., AS AMICUS CURIAE, IN SUPPORT OF REVERSAL

Paul Alan Levy (Temp. No. 305695 TA)
Public Citizen Litigation Group
1600 20th Street NW
Washington, D.C. 20009
(202) 588-1000
plevy@citizen.org

Steven M. Badger (No. 16354-49)
Bose McKinney & Evans LLP
Suite 2700
111 Monument Circle
Indianapolis, Indiana 46204
(317) 684-5000
sbadger@boselaw.com

Attorneys for Public Citizen

June 27, 2011

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS

MISCELLANEOUS

Thompson, *On the Net, in the Dark,*
California Law Week, Volume 1, No. 9, at 16, 18 (1999) 16

Tien, *Who's Afraid of Anonymous Speech? McIntyre and the Internet,*
75 Ore. L. Rev. 117 (1996) 5

WEBSITES

Fischman, *Protecting the Value of Your Goodwill from Online Assault,*
www.fhdlaw.com/html/ bruce_article.htm 17

Fischman, *Your Corporate Reputation Online,*
www.fhdlaw.com/html/corporate_ reputation. htm 17

Werthammer, *RNN Sues Yahoo Over Negative Web Site,*
Daily Freeman, November 21, 2000, www.zwire.com/site/news.cfm?newsid
=1098427&BRD =1769&PAG=461&dept_id=4969&rfi=8 16

INTEREST OF AMICUS CURIAE

Public Citizen, Inc., is a public-interest organization based in Washington, D.C. It has more than 225,000 members and supporters nationwide, about 2700 of them in Indiana. Since 1971, Public Citizen has encouraged public participation in civic affairs, and has brought and defended numerous cases involving the First Amendment rights of citizens who participate in civic affairs and public debates. *See* http://www.citizen.org/litigation/briefs/internet.htm. Public Citizen has represented Doe defendants and Internet forum hosts, and has appeared as amicus curiae, in many cases involving subpoenas seeking to identify the authors of anonymous Internet messages.

STATEMENT

This case arose from a financial crisis in projects of defendant-appellee Junior Achievement ("JA"), a charitable organization of which plaintiff Jeffrey Miller was formerly the CEO. Controversy erupted between the current and former leadership of JA and was reported in several articles in the Indianapolis Star ("Star") and the Indianapolis Business Journal ("IBJ"). Over a period of three weeks, from March 20 to April 6, 2010, members of the public posted anonymous comments to online versions of these stories. *See* Complaint ¶¶ 74-90. Some argued that Miller bore responsibility for the problems because he established projects as separate entities, then appointed himself to lead the new entities, resulting in needless drain on JA's resources. For example, comments on March 19 and 20 objected to the "misuse [for their own personal gain]" of charitable funds by the "former CEO [Miller] and finally fired VP"; these comments called the misuse "an embarrassment to the dedicated staff ... and most likely a criminal act," *id.* ¶¶ 74, 90, and demanded an audit. An April 6 comment stated, "[t]hese guys are crooks [Jeff Miller, Victor George and other parties] and have been robbing from our community using kids as there [sic] hook. I hope they go to jail." *Id.* ¶ 85.

On April 3, 2010, anonymous Internet user "DownWithTheColts" posted this comment: "This is not JA's responsibility. They need to look at the FORMER president of JA and others on the ELEF board. The 'missing' money can be found in their bank accounts." Second Amended Complaint ¶ 87. This statement is at issue in this appeal.

Plaintiffs Jeffrey and Cheryl Miller sued for defamation and subpoenaed Star and IBJ to identify the commenters. Both Star and IBJ objected, citing the Indiana Shield Law as well as the qualified First Amendment privilege to speak anonymously, and opposed the Millers' ensuing motion to compel. The Millers' submissions in support of compelling discovery did not include any evidence, not even by their own affidavits, to establish falsity, and made no mention of any notice to the Does about the subpoenas, whether by posting notices as comments to the stories, or asking the Court to order publications to send notice to any email addresses they had for the anonymous posters.

Rather than undertaking these simple steps, which are demanded by state and federal courts throughout the country, the Millers argued that no showings were required. The trial court agreed, ordering both publications to identify their users. IBJ complied with the order, but Star appealed.

SUMMARY OF ARGUMENT

This appeal involves an issue of first impression in Indiana that has been addressed consistently by state appellate courts across the country: what procedures apply, and what showings are required, when a plaintiff asserts a claim for defamation or some other tort based on anonymous online speech and seeks to identify the anonymous speaker? Based on the well-accepted First Amendment right to speak anonymously, and recognizing that First Amendment rights cannot be infringed without a compelling state interest, courts generally hold, following the so-called *Dendrite* test, that anonymous would-be defendants must be notified of the threat to their First Amendment

right to speak anonymously, and would-be plaintiffs must make both a legal and an evidentiary showing of merit before government power may be deployed to identify anonymous critics.

The principal advantage of the *Dendrite* test is its flexibility. It balances the interests of the plaintiff who claims to have been wronged against the interest in anonymity of the Internet speaker who claims to have done no wrong. In that way, it provides for a preliminary determination based on a case-by-case, individualized assessment of the equities. It avoids creating a false dichotomy between protection for anonymity and the right of victims to be compensated for their harms. It ensures that online speakers who make wild and outrageous statements about public figures, companies, or private individuals will not be immune from identification and from being brought to justice. At the same time, the standard helps ensure that persons with legitimate reasons for criticizing public figures anonymously will be allowed to maintain the secrecy of their identity as the First Amendment allows.

The *Dendrite* test also has the advantage of discouraging lawsuits whose real objective is discovery and the "outing" of anonymous speakers. In the first few years of the Internet, thousands of lawsuits were filed seeking to identify online speakers, and enforcement of subpoenas was almost automatic. ISP's have reported some staggering statistics about the number of subpoenas they received.

Although no firm numbers can be cited, experience leads amicus to believe that the number of suits being filed to identify online speakers dropped after *Dendrite* was decided. Decisions that adopted strict legal and evidentiary standards for defendant identification sent a signal to would-be plaintiffs and their counsel to stop and think before they sue. At the same time, the identification of many online speakers, and publicity about verdicts against formerly anonymous defendants, discouraged some would-be posters from indulging in the sort of Wild West atmosphere that originally encouraged the more egregious examples of

online irresponsibility. The Court should preserve this balance by adopting the *Dendrite* test that weighs plaintiffs' interest in vindicating their reputations in meritorious cases against the right of Internet speakers to maintain their anonymity when their speech was not wrongful.

The Court should reverse the decision below and remand the case to give plaintiffs a chance to satisfy the proper test.

ARGUMENT

The Appeal Involves an Issue of First Impression in Indiana, but State Appellate Courts Elsewhere Consistently Hold That Plaintiffs Must Do More Than the Millers Did Here to Be Entitled to Identify Anonymous Critics.

Plaintiffs contend that defamation is outside the protection of the First Amendment, and that because the speech at issue on this appeal is so plainly defamation, the Court need not consider whether there are sound reasons to withhold the power of a court order to compel Star to identify the anonymous critic. However, plaintiffs' argument begs the question, and courts in other states, facing precisely the same argument, have understood that such arguments are fundamentally unsound. Plaintiffs have not shown that the Doe defendant defamed them-at this point, it is only an allegation, and the issue in the case is what showing plaintiff should have to make before an anonymous critic is stripped of that anonymity by an exercise of government power.

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, 166-67 (2002); *Buckley* v. *American Constitutional Law Found.,* 525 U.S. 182, 199-200 (1999); *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 U.S. at 341-342, 356 (emphasis added).

Moreover, because Article I, Section 9 of the Indiana Constitution protects free speech rights even "more jealously ... than does the United States Constitution," *Mishler* v. *MAC Systems,* 771 N.E.2d 92, 97 (Ind. Ct. App. 2002), Section 9 similarly protects the right to speak anonymously.

These rights are fully applicable to speech on the Internet. 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,* 775 A.2d 756 (N.J.App. 2001).

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.

Moreover, 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 email 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, 504-05 (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, many observers argue that the law should provide special protections for anonymity on the Internet. *E.g.,* Lidsky & Cotter, *Authorship, Audiences and Anonymous Speech,* 82 Notre Dame L. Rev. 1537 (2007); Post, *Pooling Intellectual Capital: Thoughts on Anonymity, Pseudonymity, and Limited Liability in Cyberspace,* 1996 U. Chi. Legal F. 139; Tien, *Who's Afraid of Anonymous Speech? McIntyre and the Internet,* 75 Ore. L. Rev. 117 (1996).

A court order, even when issued at the behest of a private party, is state action and hence is subject to constitutional limitations. *New York Times Co. v. Sullivan,* 376 U.S. 254, 265 (1964); *Shelley v. Kraemer,* 334 U.S. 1 (1948). The Supreme Court has held that a court order to compel production of individuals' identities in a situation that would threaten the exercise of fundamental rights "is subject to the closest scrutiny." *NAACP* v. *Alabama,* 357 U.S. 449, 461 (1958); *Bates* v. *City of Little Rock,* 361 U.S. 516, 524 (1960). Abridgement of the rights to speech and press, "even though unintended, may inevitably follow from varied forms of governmental action," such as compelling the production of names. *NAACP,* 357 U.S. at 461.

First Amendment rights may also be curtailed by means of private retribution following such court-ordered disclosures. *Id.* at 462-63; *Bates,* 361 U.S. at 524. Due process requires the showing of a "subordinating interest which is compelling" where, as here, compelled disclosure threatens a significant impairment of fundamental rights. *Id.* at 524; *NAACP,* 357 U.S. at 463. Because compelled identification trenches on the First Amendment right of anonymous speakers to remain anonymous, justification for infringing on 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.

The courts have recognized the serious chilling effect that subpoenas seeking to identify 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, 1284-85 (11th Cir. 1982); *Ealy v. Littlejohn,* 569 F.2d 219, 226-30 (5th Cir. 1978). In an analogous area of law, the courts have evolved a standard for compelled disclosure of the sources of libelous speech, recognizing a qualified privilege against disclosure of otherwise anonymous sources. In those cases, courts apply a three-part test, under which a litigant seeking to identify an 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 the 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. Dep't of Justice,* 413 F.3d 53, 60 (D.C.Cir. 2005); *Ashcraft v. Conoco, Inc.,* 218 F.3d 282, 288 (4th Cir. 2000); *LaRouche v. NBC,* 780 F.2d 1134, 1139 (4th Cir. 1986), quoting *Miller v. Transamerican Press,* 621 F.2d 721, 726 (5th Cir. 1980); *Cervantes v. Time,* 464 F.2d 986 (8th Cir. 1972).

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, "[i]f 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). *See also Columbia Insurance Co. v. Seescandy.com,* 185 F.R.D. 573, 578 (N.D.Cal. 1999) (emphasis added):

> 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.**

B. The Qualified Privilege for Anonymous Speech Supports a Five-Part Standard for the Identification of John Doe Defendants.

In recent cases, courts have recognized that the mere fact that a plaintiff has filed a lawsuit over a particular piece of 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. But setting the bar too high will make it impossible for plaintiffs with perfectly valid claims to identify wrongdoers and proceed with their cases.

Courts 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,* 775 A.2d 756 (N.J. App. 2001), established a five-part standard that has been 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. at 760-61.

A somewhat less exacting standard, formulated in *Cahill,* requires the submission of evidence to support the plaintiff's claims, but not an explicit balancing of interests after the evidence is deemed otherwise sufficient to support discovery. *Cahill,* 884 A.2d 451. In *Cahill,* the Delaware Superior Court had ruled 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. However, the Delaware Supreme Court ruled that a plaintiff must put forward evidence sufficient to establish a prima facie case on all elements of a defamation claim that ought to be within his control without discovery, including that the statements are false. The *Cahill* court rejected the final "balancing" stage of the *Dendrite* standard.

All of the other state appellate courts, plus several federal district courts, that have addressed the issue of subpoenas to identify anonymous Internet speakers have adopted some variant of the *Dendrite* or *Cahill* standards. Several courts expressly endorse the *Dendrite* test, requiring notice and opportunity to respond, legally valid claims, evidence supporting those claims, and finally an explicit balancing of the reasons supporting disclosure and the reasons supporting continued anonymity. These decisions include:

> *Mobilisa,* 170 P.3d 712, 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,* 966 A.2d 432, 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.

Several other courts have followed a *Cahill-like* summary judgment standard, although without necessarily rejecting the final balancing stage. For example:

Krinsky v. Doe 6, 72 Cal.Rptr.3d 231 (Cal.App. 2008), where the appellate court 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." *Id.* at 251.

In re Does 1-10, 242 S.W.3d 805 (Tex.App. 2007), which 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.[1]

Similarly, in *Melvin v. Doe,* 49 Pa. D&C 4th 449 (2000), *rev'd on other grounds,* 836 A.2d 42 (2003), the court ordered disclosure only after finding genuine issues of material fact requiring trial. Although its holding reached only the issue of appellate jurisdiction, in reversing the order of disclosure, the Pennsylvania Supreme Court expressly recognized the right to speak anonymously and sent the case back for a determination of whether, under Pennsylvania libel law, actual economic harm must be proved as an element of the cause of action:

> [C]ourt-ordered disclosure of Appellants' identities presents a significant possibility of trespass upon their First Amendment rights. There is no question that generally, the constitutional right to anonymous free speech is a right deeply rooted in public policy that goes beyond this particular litigation, and that it falls within the class of rights that are too important to be denied review. Finally, it is clear that **once Appellants' identities are disclosed, their First Amendment claim is irreparably lost as there are no means by which to later cure such disclosure.**

836 A.2d at 50 (emphasis added).

Federal district courts have repeatedly followed *Cahill* and *Dendrite. Best Western Int'l v. Doe,* 2006 WL 2091695 (D. Ariz. July 25, 2006) (court used a five-factor test drawn from *Cahill,*

[1] In *Maxon* v. *Ottawa Publ'g Co.,* 929 N.E.2d 666 (Ill. App. 2010), the Illinois Court of Appeals found it unnecessary to apply the First Amendment to a petition for pre-litigation discovery the state's rules already required a verified complaint, specification of the defamatory words, determination that a valid claim was stated, and notice to the Doe.

Dendrite, and other decisions); *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"); *Fodor v. Doe,* 2011 WL 1629572 (D.Nev., April 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)); *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).

Although these cases set out slightly different standards, each requires a court to weigh the plaintiff's interest in identifying the person who has allegedly violated its rights against the interests implicated by the potential violation of the First Amendment right to anonymity, thus ensuring that First Amendment rights are not trammeled unnecessarily. Put another way, the qualified privilege to speak anonymously requires courts to review a would-be plaintiff's claims and the evidence supporting them to ensure that the plaintiff has a valid reason for piercing the speaker's anonymity.

C. The Millers Have Not Followed the Steps Required Before Identification of the John Doe Speaker May Be Ordered in This Case.

(1) Plaintiffs Did Not Ensure Notice to Doe.

When courts receive requests for permission to subpoena anonymous Internet posters, they should require plaintiffs to undertake efforts to notify the posters that they are the subject of subpoenas, and then withhold any action for a reasonable period of time until defendants have had time to retain counsel. *Columbia Ins.,* 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. 775 A.2d at 760.

Indeed, notice and an opportunity to defend are fundamental requirements 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. Accordingly, the Court is urged to follow the *Dendrite* example by requiring posting in addition to other likely means of effective notice.

In many cases, posting will not be the only way of notifying 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, as in this case, 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. 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 every web site where they have given their old addresses.[2]

The industry standard is to provide between two weeks and twenty days' notice to Doe posters, although a Virginia statute requires twenty-five days. Va. Code §§ 8.01-407.1(1) and (3). 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 the time needed not only 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.[3]

In this case, the Millers could and should have posted notice of their subpoena on the news story where DownWithTheColts posted, and they could have asked the trial court to order Star to send notice of the subpoena to the email address that DownWithTheColts would have had to provide in the course of registering to post comments on the forum.

[2]In the *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.

[3]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.

The order below should be reversed for that reason alone.

(2) Jeffrey Miller, But Not Cynthia Miller, Has Identified the Actionable Words and Pleaded the Bare Elements of a Defamation Claim.

The second and third stages of the *Dendrite* test have been satisfied in this case. It is important to require the plaintiff to set out the precise words claimed to be defamatory (and the context of those words) because it is often possible to determine, just from the words themselves, that no tenable claim for defamation could be brought. For example, some statements may not be actionable because they are not "of and concerning" the plaintiff, which is a requirement under the First Amendment. *New York Times Co.,* 376 U.S. at 288 (1964). Other statements may be non-defamatory as a matter of law because they are merely rhetorical expressions of opinion, which are excluded from the cause of action for defamation. *Cahill,* 884 A.2d at 467. Some may not be actionable because the statute of limitations has run since the date of their posting.[4]

Here, because the words specifically identified are not "of and concerning" Cynthia Miller, she lacks standing to sue for defamation. *See Gintert v. Howard Publ'ns,* 565 F. Supp. 829, 832-33 (N.D. Ind. 1983). Although the words appear to state facts about Jeffrey Miller, not just opinions, the reference to JA's money being in its former officials' bank accounts may simply be a rhetorical way of complaining about high salaries and benefits, not a criminal taking of money. In that case, Miller would have to allege (and prove) special damages instead of taking advantage of the presumption of damages that applies to libel per se. If the words are defamatory per se, the Second Amended Complaint alleges the elements of a libel claim against DownWithTheColts. Thus, these parts of the test would have been satisfied.

[4]Courts generally hold that the single publication rule applies to Internet postings. *Nationwide Bi-Weekly Admin.* v. *Belo Corp.,* 512 F.3d 137, 143-46 (5th Cir. 2007).

(3) Miller Has Provided No Evidentiary Support for His Claims.

No person should be subjected to compulsory identification through a court's subpoena power unless the plaintiff produces sufficient evidence supporting each element of a cause of action to show a realistic chance of winning a lawsuit against that defendant. This requirement has been followed by every federal court and every state appellate court that has addressed the standard for identifying anonymous Internet speakers, because it prevents plaintiffs from being able to identify critics simply by filing facially adequate complaints.

Plaintiffs often argue that they need to identify the defendants simply to proceed with their case. However, no relief is generally awarded to plaintiffs until they come forward with **evidence** in support of their claims, and the Court should recognize that identification of otherwise anonymous speakers is a major form of relief in cases like this. Requiring actual evidence to enforce subpoenas is particularly appropriate where the relief itself may undermine, and thus violate, defendants' First Amendment right to speak anonymously.

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,* California Law Week, Volume 1, No.9, at 16, 18 (1999). Some lawyers who are highly respected in their own legal communities have admitted that the mere identification of their clients' anonymous critics may be all that they desire to achieve through the lawsuit. *E.g.,* Werthammer, *RNN Sues Yahoo Over Negative Web Site,* Daily Freeman, Nov. 21, 2000, www.zwire.com/site/news.cfm?newsid = 1098427&BRD = 1769&PAG=461&dept_id=4969&rfi=8. 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. 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. 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. See Swiger v. Allegheny Energy,* 2006 WL 1409622 (E.D. Pa. May 19, 2006) (company represented by the largest and most respected law firm in Philadelphia 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 pendency of a subpoena may have the effect of deterring other members of the public from discussing the plaintiff.

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 Prods. Antitrust Litig.,* 680 F.2d 5, 6-9 (2d Cir. 1982); *Richards of Rockford v. PGE,* 71 F.R.D. 388, 390-91 (N.D. Cal. 1976). In effect, the plaintiff should be required to present admissible evidence establishing a prima facie case, if not to "satisfy the trial court that he has evidence to establish that there is a genuine issue of fact" regarding the falsity of the publication. *Downing* v. *Monitor Publ'g Co.,* 415 A.2d 683, 686 (N.H. 1980); *Cervantes,* 464 F.2d at 993-94. "Mere speculation and conjecture about the

fruits of such examination simply will not suffice." *Id.* at 994.[5]

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. 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). And although one may well take with a grain of salt the assertion that a single comment to a news story about a controversy that has already been extensively aired in the local press caused any injury to plaintiff, if the particular comment caused such injury the plaintiff should have evidence of that fact. 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. However, even assuming that Miller is a public figure, actual malice is usually not an element that a public figure can be expected to establish without knowing the identity of the defendant and having the opportunity to take his deposition. *E.g., Cahill,* 884 A.2d at 464.

Nor can the Millers effectively argue that requiring evidence to support their claims is a burden so onerous that plaintiffs who can likely succeed on the merits of their claims will be unable to present such proof at the outset of their cases. Many plaintiffs succeeded in identifying Doe defendants in jurisdictions that follow *Dendrite* and *Cahill. E.g., Does v. Individuals whose*

[5] *Downing* took comfort from the fact that the plaintiff there was represented by "respected counsel." 415 A.2d at 686. However, courts should not adopt a standard that depends on an evaluation of the quality of the lawyers appearing in the case. Less experienced lawyers, and even pro se parties, who often seek subpoenas to identify anonymous critics, should receive equal respect before the law.

true names are unknown, 561 F.Supp. 2d 249*; Alvis Coatings v. Does,* 2004 WL 2904405. Indeed, in *Immunomedics v. Doe,* 775 A.2d 773 (2001), a companion case to *Dendrite,* the court ordered that the anonymous speaker be identified. In *Dendrite* itself, two of the Does were identified while two were protected against discovery.

(4) The Case Should Be Remanded for Application of the Dendrite Balancing Test.

If, on remand, Miller submits evidence sufficient to establish a prima facie case of defamation against each Doe defendant,

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

On the other side of the balance, the 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. If courts impose such limits, plaintiffs who hope to identify and intimidate anonymous speakers could simply conjure up additional causes of action to allege against them.

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, LLC v. Does 1-1,062,* — F.Supp.2d —, 2011 WL 996786 (D.D.C. Mar. 22, 2011); *Sony Music Entertainment v. Does 1-40*, 326 F. Supp.2d 556 (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*, at *13 nn.7, 8. Although these courts do not explicitly invoke the balancing stage of *Dendrite*, they implicitly do so.

In this case, the record does not enable the Court to assess the equitable considerations in the case. On remand both plaintiffs and the Doe, if the Doe takes advantage of effective notice, may offer evidence and argument permitting the effective application of the balancing stage.

CONCLUSION

The decision below should be reversed and the case remanded with instruction to apply the *Dendrite* standard.

Respectfully submitted,

Paul Alan Levy (Temp. No. 3056 95 TA)
Public Citizen Litigation Group
1600 - 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000
plevy@citizen.org

Steven M. Badger (No. 16234-49)
Bose McKinney & Evans LLP
Suite 2700
111 Monument Circle
Indianapolis, Indiana 46204
(317) 684-5000
sbadger@boselaw.com

Attorney for Public Citizen

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WORD COUNT CERTIFICATE

I verify that this Brief of Public Citizen as Amicus Curiae contains no more than 7000 words.

Paul Alan Levy (Temp. No. 3056 95 TA)

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the foregoing response has been served this 27th day of June, 2011, by depositing a copy of the same in the United States Mail, first-class postage prepaid, and properly addressed to the following counsel of record:

Kevin W. Betz
Jamie A. Maddox
BETZ & ASSOCIATES, P.C.
One Indiana Square, Suite 1660
Indianapolis, Indiana 46204

James S. Stephenson
Ian L. Stewart
STEPHENSON, MORROW & SEMLER
8710 N. Meridian Street, Suite 200
Indianapolis, Indiana 46260

Philip A. Whistler
Erik C. Johnson
Dominique A. Price
Ice Miller LLP
One American Square, Suite 2900
Indianapolis, Indiana 46282-0200

John Doe #1 a/k/a "Dave Hicks"
c/o Junior Achievement of Western Pennsylvania
c/o Dennis Gilfoyle, President
One Allegheny Center, Suite 430
Pittsburgh, Pennsylvania 15212

John Doe #3 a/k/a "DownWithTheColts"
Address to be Acquired

John Doe #6 a/k/a "JA Fan"
Address to be Acquired

Heather L. Wilson
Darren A. Craig
FROST BROWN TODD, LLC
201 North Illinois Street, Suite 1900
Indianapolis, Indiana 46204

Stephen E. Springer
Beth A. Schenberg
KIGHTLINGER & GRAY LLP
600 Market Square Center
1561 North Delaware Street
Indianapolis, Indiana 46204

500 Festival, Inc.
c/o Kirk Hendrix, CEO and President
500 Festival Building
21 Virginia Avenue, Suite 500
Indianapolis, Indiana 46204

John Doe #2 a/k/a "Concerned"
c/o Trea W. Southerland
FEDERAL EXPRESS CORPORATION
3620 Hacks Cross Road
Building B, 3rd Floor
Memphis, Tennessee 38125-8800

John Doe # 4 a/k/a "Intrigued"
c/o Comcast Legal Response Center
COMCAST CABLE COMMUNICATIONS, LLC
650 Centerton Road
Moorestown, New Jersey 08057

John Doe #5 a/k/a "Indeed Not"
c/o Comcast Legal Response Center
COMCAST CABLE COMMUNICATIONS, LLC
650 Centerton Road
Moorestown, New Jersey 08057

Trea W. Southerland
FEDERAL EXPRESS CORPORATION
3620 Hacks Cross Road
Building B, 3rd Floor
Memphis, Tennessee 38125-8800

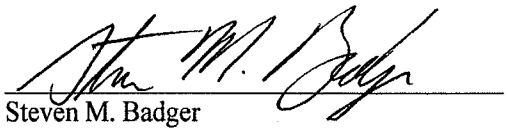
Edward J. Bielski
Christine M. Reisner
STEWART & IRWIN, P.C.
251 East Ohio Street, Suite 1100
Indianapolis, Indiana 46204-2147

Arend J. Abel
COHEN & MALAD, LLP
One Indiana Square, Suite 1400
Indianapolis, Indiana 46204

Ty M. Craver
Elizabeth A. Trachtman
HILL, FULWIDER, MCDOWELL, FUNK & MATTHEWS
One Indiana Square, Suite 2400
Indianapolis, Indiana 46204

Michael R. Bain
Andrew P. Wyrick
Beth A. Barnes
HUME, SMITH, GEDDES, GREEN, & SIMMONS LLP
54 Monument Circle
Indianapolis, Indiana 46204

Jan M. Carroll
Paul Jefferson
Kara M. Kapke
BARNES & THORNBURG LLP
11 South Meridian Street
Indianapolis, IN 46204



Steven M. Badger