IN THE
Supreme Court of Virginia

RECORD NO. 140242

YELP, INC.,
Non-party Respondent-Appellant,

v.

HADEED CARPET CLEANING, INC.,
Plaintiff-Appellee.

YELP, INC.'S OPENING BRIEF

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ASSIGNMENTS OF ERROR ON WHICH APPEAL WAS GRANTED

1. The Court of Appeals erred when, in disagreement with appellate courts in ten other states, it held that the First Amendment allows a court to enforce subpoenas to Internet providers for information identifying users who exercised their First Amendment right to speak anonymously, without any evidence that the users' speech was tortious or otherwise wrongful.
Yelp's Appellate Opening Brief ("AOB") 17-13, 28-31.

2. The Court of Appeals erred by deciding that it could not reach the First Amendment issue without first deciding that the statutory procedure for litigating subpoenas to identify anonymous speakers, Virginia Code § 8.01-407.1, is unconstitutional. Yelp's Appellate Reply Brief ("ARB") 2-3 and oral argument.

3. The Court of Appeals erred by concluding that § 8.01-407.1 reflects a legislative policy decision to reject the approach of appellate courts in other states that require evidence of wrongdoing before the First Amendment right to speak anonymously is taken away. Raised for the first time at oral argument.

4. The Court of Appeals erred by stating that it need not find a compelling interest because any criticism of a commercial enterprise is commercial speech, a ruling that is without legal basis and was not raised by briefs of either party below, whose briefs cited only cases involving noncommercial speech. AOB 10, 13, 16; Hadeed Appellate Brief 14, 16-19.

5. The Court of Appeals erred by ruling that § 8.01-407.1 and the First Amendment authorized enforcement of Hadeed Carpet Cleaning's subpoena to identify seven anonymous speakers without any evidence that the gist of their criticisms of Hadeed's business practices was untrue. AOB 26-31.

6. The Court of Appeals erred by failing to consider the devastating consequences to anonymous online speech that would result from allowing disclosure of speakers' identities without evidence of tortious conduct. AOB 16-17.

7. The Court of Appeals erred by failing to consider whether there was a compelling governmental interest in infringing on the First Amendment rights

of anonymous online speakers. AOB 10.

8. The Court of Appeals erred by applying an abuse of discretion standard in reviewing the Circuit Court's decision to enforce the subpoena, because decisions about the application of the First Amendment are subject to independent review on the record as a whole. AOB 11-12.

9. The Court of Appeals erred by holding, again contrary to rulings in the appellate courts of several sister states, that a Virginia trial court may assert subpoena jurisdiction over a non-party California company, to produce documents located in California, just because the company has a registered agent in Virginia. AOB 33-36.

STATEMENT OF THE CASE

This case presents a question of first impression in Virginia, but well-settled elsewhere: what standard governs judicial evaluation of a request to compel disclosure of information—such as the names, birth dates, and credit card data sought here—identifying pseudonymous defendants sued over their online statements. Courts across the country have held that without prima facie evidence that plaintiffs could succeed on their claims, the First Amendment right to speak anonymously bars discovery. The law in Virginia should be no different. Unfortunately, the courts below held that mere speculation of supposed wrongdoing—without any evidence—was enough to override the First Amendment right to speak using pseudonyms. The Court should reverse these conclusions and ensure that Virginia's laws protect Virginians who wish to share their ideas without broadcasting their identity.

Hadeed Carpet Cleaning subpoenaed Yelp to identify the authors of seven consumer reviews, including claims that Hadeed charges more than advertised low prices. Yelp objected, both because Hadeed presented no evidence that the reviews contained false statements and therefore no compelling interest outweighed the reviewers' First Amendment right to speak anonymously, and because, as a non-party California company, Yelp could only be required to respond to a California subpoena. Hadeed successfully

moved to overrule the objections in the Circuit Court for Alexandria. To obtain the right of appeal, Yelp declined to obey the order and took a contempt citation.

The Court of Appeals affirmed, App. 206-232, reasoning that it could not find the subpoena in violation of the First Amendment without holding a Virginia statute unconstitutional, that the statute represented a conscious legislative decision not to require evidence before subpoenas to identify anonymous speakers could be enforced, and that, applying the presumption against finding a statute unconstitutional, the Court could not find the statute to be, without any doubt, in violation of the First Amendment. Thus, the Court ruled that enforcement of the subpoena without evidence of falsity did not violate the statute. The majority held that the vague belief of Hadeed's counsel that the reviewers were not customers, based on the representation that Hadeed had reviewed a database to see whether the pseudonymous reviewers were customers, was sufficient reason to enforce the subpoena. In dissent, Judge Haley said that a conclusory claim to have conducted an investigation into whether the reviewers were customers, especially where Hadeed never asserted that the underlying complaints were false, was not enough reason to enforce the subpoena considering the First Amendment rights at stake.

The main question on this appeal is whether the lower courts applied the proper legal standard in overriding the anonymous speakers' First Amendment rights. The proper response, as courts in ten other states and throughout the federal system have recognized, is to require the plaintiff to show that it has alleged a valid claim and that it has a prima facie evidentiary basis for that claim. Far from conflicting with Va. Code § 8.01-407.1, this approach easily accommodates it.

Enforcing the subpoena on a record as bare as in this case creates a road map for denying the right to speak anonymously in Virginia—a merchant need only say that a consumer critic has employed a successful pseudonym, claim that the critic might not be a customer, and thus obtain compulsory process to identify the critic. That is not and should not be the law.

FACTS AND PROCEEDINGS BELOW

A. Background

As electronic communications have become essential tools for speech, the Internet has become a democratic institution in the fullest sense. It is the modern equivalent of Speakers' Corner in England's Hyde Park, where ordinary people may voice their opinions, however 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.
>
> Full First Amendment protection applies to speech on the Internet.

Knowing that people love to share their views, many companies have organized outlets for the expression of opinions. A leading example of such websites is Yelp, which presents online forums for consumers to share their experiences with local merchants.

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

Many Internet forums have a significant feature—and Yelp is typical—that makes them very different from almost any other form of published expression. Although members of the public can criticize as well as praise, people who disagree with published criticisms can typically respond immediately at no cost, giving facts or opinions to vindicate their positions,

and thus, possibly, persuading the audience that they are right and their critics are wrong. Appellant Yelp enables any merchant whose goods and services are subject to consumer reviews to place its reply directly under any review; Hadeed has repeatedly taken advantage of this privilege. In this way, the Internet provides the ideal proving ground for the proposition that the marketplace of ideas, rather than the courtroom, provides the best forum for the resolution of disputes about facts and opinions.

B. Facts of This Case

Hadeed is a Virginia carpet-cleaning company. As of October 19, 2012, Yelp's public website displayed seventy-five reviews about Hadeed and eight more reviews about its Washington, D.C. location, Hadeed Oriental Rug Cleaning. App. 80 ¶ 9, 82-118. Individuals posted these reviews on Yelp's website, which enables consumers to describe their experiences with local businesses. Yelp's rules require reviewers to have actually had a customer experience with the business reviewed and to base their posts on personal experiences. App. 80 ¶ 10. Posts that violate these requirements are subject to removal. In addition, Yelp uses a proprietary algorithm to screen potentially less reliable reviews; such reviews are moved to a separate page, which a visitor to Yelp's site can view by clicking on a link at the bottom of a business listing; ratings associated with those reviews are not factored into the

business's overall Yelp rating. App. 81 ¶ 12. Taking the screened and unscreened reviews together, reviews left by forty-eight consumers gave Hadeed the lowest possible rating, one star, but twenty-eight others gave the highest possible rating of five stars. Two, three and two consumers gave ratings of two, three, and four stars, respectively. App. 80 ¶ 11, 82-118.

Yelp users must register with a valid email address to be able to post reviews. App. 78-79 ¶ 3. However, users may choose any screen name they like, and designate any zip code as their "location." The user's actual name or location need not be provided (although Yelp encourages real names). *Id.* Moreover, users may change locations without changing location descriptions. *Id.* Yelp also typically records the Internet Protocol ("IP") address from which each posting is made. App. 79 ¶ 4. This information is typically stored in Yelp's administrative databases and is accessible to Yelp's custodian of records in San Francisco. *Id.*

Hadeed sued the authors of seven specific reviews. It alleges that it had tried to match the reviews with its customer database but "had no record that [these] negative reviewers were ever actually Hadeed Carpet customers," App. 3 ¶ 13, and consequently claims to harbor the "belie[f]" that the reviews were made by Defendants who "falsely represented . . . themselves as customers of Hadeed." App. 4 ¶ 20. Hadeed offered no evidence below to

support its belief, no description of its investigation (such as the format of the database or the methodology employed), and no explanation of how its investigation led it to that belief. Indeed, in seeking identifying information, Hadeed's unsworn attachment said it was "left wondering if these are even true customers to begin with." App. 23. Hadeed freely acknowledged below the shaky basis for its subpoena—to the trial court, Hadeed's counsel said, "I don't know whether that person is a customer or not, and we suspect not," App. 166, and on appeal Hadeed "candidly admitted that it cannot say the John Doe defendants are not customers until it obtains their identities." App. 232. Hadeed even apologized to "MP," one of the reviewers it is now suing, recognizing that she was a customer. App. 103.

Hadeed alleges that the posts were false and defamatory, *id.* ¶ 15, but **only** because of its suspicion that the authors were not customers. Hadeed does not allege that the substance of the postings was false. For example, Hadeed does not deny that it sometimes charges twice the advertised price, that Hadeed sometimes charges for work it never performed, that Hadeed sometimes performs unauthorized work, or that Hadeed sometimes returns rugs to the customer containing stains. Rather, the only falsity alleged in the complaint is the supposition that the reviewers could not have been actual customers because they were not recognized in Hadeed's database. App. 4

¶ 20, 5 ¶ 22.

Many Yelp reviews make the same points as the challenged reviews. *E.g.*, App. 86, 87, 89, 90, 91, 92, 93. The fact that Hadeed has not sued the authors of those comments implies that Hadeed recognizes that its actual customers have such problems. Indeed, Hadeed had previously responded to several customer reviews that raise such issues by promising that the feedback would help the company to improve. *E.g.*, App. 86, 87.

The negative reviews over which Hadeed has sued are not only consistent with other unchallenged reviews on Yelp, but also with Hadeed's F rating with the Better Business Bureau,[1] its C rating on Angie's List,[2] and its low consumer satisfaction in the Washington Consumer Checkbook survey of carpet cleaning companies.[3]

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[1]http://www.bbb.org/washington-dc-eastern-pa/business-reviews/carpet-and-rug-cleaners/hadeed-carpet-cleaning-inc-in-alexandria-va-9331/ (visited July 16, 2014).

[2]http://my.angieslist.com/AngiesList/myangie/checkthelist/spinformation.aspx?Qs7iGnUUlMwgbNR7NG2qLIDsdl0wR4P+v4wyspRRPryTXen2giPnbofUurqGOVdcxQrSwHnbTwY3yTts82gG247dOMa3LSzYRKelWeLplcOLzlJMz8buD9fYq3VgbR+F (subscription required).

[3] Fall 2013/Winter2014 issue, page 63.

C. Proceedings Below.

On July 2, 2012, Hadeed filed suit in the Circuit Court for the City of Alexandria, alleging defamation and conspiracy to defame. App. 1-6. Hadeed subpoenaed Yelp to produce documents identifying the authors of seven anonymous reviews, serving Yelp's registered agent in Virginia. Pursuant to section 8.01-407.1(A)(4), Yelp objected that the subpoena contravened both Virginia law and the First Amendment rights of Yelp's users, and that the Virginia court lacked jurisdiction to subpoena documents located in California from a non-party, non-resident company. App. 7-9. Yelp urged adoption of the First Amendment analysis adopted by state appellate courts throughout the country, following the lead of *Dendrite v. Doe*, 775 A.2d 756 (N.J. App. Div. 2001), and *Doe v. Cahill*, 884 A.2d 451 (Del. 2005), that requires a plaintiff seeking to identify anonymous Internet speakers to make sufficient legal and evidentiary showings of the suit's merit before a court may deny users the First Amendment right to speak anonymously.

Hadeed moved to overrule those objections, and the Circuit Court enforced the subpoena. App. 183-185. Yelp disobeyed the subpoena so that it could appeal from the ensuing contempt judgment. App. 186-188. On appeal, Yelp argued that enforcement of the subpoena violated both the First Amendment and § 8.01-407.1(A)(4) which, Yelp argued, was properly

construed to incorporate the First Amendment protections that other state appellate courts had found necessary. Yelp also argued that Virginia should construe its rules concerning subpoenas to non-party foreign corporations consistent with the longstanding approach in other states, whose courts hold that documents can be obtained only from companies residing within the state, while mutual interstate discovery statutes are employed to obtain documents from out-of-state companies.

A divided Court of Appeals affirmed. App. 206-232. It declined to adopt the *Dendrite* approach because it believed that the Virginia Legislature had considered but rejected it in adopting § 8.01-407.1, and that it could not follow *Dendrite* under the First Amendment without holding the statute unconstitutional which, it said, it could not do because "any reasonable doubt as to the constitutionality of a statute must be resolved in favor of its constitutionality." App. 222. It also held that Virginia's rules of procedure authorize courts to exercise subpoena jurisdiction over non-party corporations that have registered agents in Virginia.

INTRODUCTION AND SUMMARY OF ARGUMENT

Full First Amendment protection applies to communications on the Internet, and longstanding precedent recognizes that speakers have a First Amendment right to communicate anonymously, so long as they do not

violate the law in doing so. Thus, when a complaint is brought against an anonymous speaker, courts must balance the right to obtain redress from the perpetrators of civil wrongs against the right to anonymity of those who have done no wrong. In cases such as this one, these rights come into conflict when a plaintiff seeks an order compelling disclosure of a speaker's identity, which, if successful, would irreparably destroy the defendant's First Amendment right to remain anonymous.

In such cases, identifying an unknown defendant is not merely the first step toward establishing liability for damages. Identifying the speaker gives the plaintiff important, immediate relief because it enables him 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 forever loses the right to remain anonymous, not only on the speech at issue, but with respect to **all** speech posted with the same pseudonym. The speaker is also exposed to efforts to restrain or oppose his speech. For example, an employer might discharge a whistleblower, or a public official might use influence to retaliate against the speaker. Similar cases across the country, and advice openly given by lawyers to potential clients, demonstrate that access to identifying information to enable extra-judicial action may be the only reason plaintiffs bring many such lawsuits.

Whatever the reason for speaking anonymously, a rule that makes it too easy to remove the cloak of anonymity will deprive the marketplace of ideas of valuable contributions. Moreover, our legal system ordinarily does not give substantial relief of this sort, even on a preliminary basis, absent proof that the relief is justified because success is likely and the balance of hardships favors the relief. The 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 manages to state a claim for relief under some tort or contract theory.

Although this is an issue of first impression in Virginia, there is a well-developed consensus among courts that have considered these issues that only a compelling interest is sufficient to outweigh the free speech right to remain anonymous. Such courts consistently hold that, when faced with a demand for discovery to identify an anonymous Internet speaker so that she may be served with process, a court should: (1) require notice to the potential defendant and an opportunity to defend her anonymity; (2) require the plaintiff to specify the statements that allegedly violate her rights; (3) review the complaint to ensure that it states a cause of action based on each statement and against each defendant; (4) require the plaintiff to produce evidence

supporting each element of her claims; and (5) balance the equities, weighing the potential harm to the plaintiff if the subpoena is not enforced against the harm to the defendant from losing her right to remain anonymous, in light of the strength of the plaintiff's evidence of wrongdoing. The court can thus ensure that a plaintiff does not obtain important relief—identification of anonymous critics—and that the defendant is not denied important First Amendment rights unless the plaintiff has a realistic chance of success on the merits.

Everything that 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 be reasonably able to provide shortly after filing the complaint, the standard does not unfairly prevent the plaintiff with a legitimate grievance from achieving redress against an anonymous speaker. And cases from jurisdictions that apply this standard show that plaintiffs regularly succeed in meeting the test and enforcing such subpoenas.

Applying these standards, Hadeed's subpoena should not have been enforced. Further, the circuit court lacked jurisdiction to enforce the subpoena against an out-of-state corporation that is not a party to the action and does not maintain the subpoenaed records in Virginia.

ARGUMENT

I. The Constitution Limits Compelled Identification of Anonymous Internet Speakers. (Assignments of Error 1, 7)

The First Amendment protects the right to speak anonymously. *Watchtower Bible & Tract Soc'y v. Village of Stratton*, 536 U.S. 150, 166-167 (2002); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960). These cases have celebrated the important role played by anonymous or pseudonymous writings over the course of history, from Shakespeare and Mark Twain to the authors of the Federalist Papers:

> [A]n author is generally free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, . . . the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.
> * * *
> Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.

McIntyre, 514 US at 341-342, 356.

The right to speak anonymously is fully applicable online. The Supreme

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

Internet speakers may choose to speak anonymously for a variety of reasons. They may wish to avoid having their views stereotyped according to presumed racial, gender or other characteristics. They may be associated with an organization but want to express an opinion of their own, without running the risk that, despite attribution disclaimers, readers will assume that the group orchestrated the statement. 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. On Yelp, for example, users might employ pseudonyms to share important, but sensitive, information about experiences with divorce lawyers or gynecologists—information that benefits the public but which speakers may not want to have readily associated with their real name and identity. To be sure, experiences with carpet cleaners are not likely to be in that category, but once identified, the Yelp user can be tied to everything else she may have said under the same pseudonym about other local service providers.

Although the Internet allows individuals to speak anonymously, it creates an unparalleled capacity to track down those who do. Anyone who sends an e-mail or visits a website leaves an electronic footprint that **could** start a path that can be traced back to the original sender. To avoid the Big Brother consequences of a rule that enables any company or political figure to identify critics, simply for the asking, the law provides special against such subpoenas. *E.g.*, Lidsky & Cotter, *Authorship, Audiences and Anonymous Speech*, 82 Notre Dame L. Rev. 1537 (2007).

When courts do not create sufficient barriers to subpoenas to identify anonymous Internet speakers named as defendants, the subpoena can be the main point of the litigation, in that plaintiffs may identify their critics and then seek no further relief from the court. Thompson, *On the Net, in the Dark*, California Law Week, Volume 1, No. 9, at 16, 18 (1999). Lawyers who represent plaintiffs in these cases have also urged companies to bring suit, even if they do not intend to pursue the action to a conclusion, because "[t]he mere filing of the John Doe action will probably slow the postings." Eisenhofer & Liebesman, *Caught by the Net*, 10 Business Law Today No. 1 (Sept.-Oct. 2000), at 40. These lawyers have similarly suggested that clients decide whether it is worth pursuing a lawsuit only after finding out who the defendant is. *Id.* Indeed, in *Swiger v. Allegheny Energy*, 2006 WL 1409622 (E.D. Pa.

May 19, 2006), a company filed a Doe lawsuit, obtained the identity of an employee who criticized it online, fired the employee, and then dismissed the lawsuit without obtaining any judicial remedy other than removal of anonymity.

Moreover, companies that make pornographic movies bring 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—whether accurately or not—will be enough to induce even the innocent defendants to pay thousands of dollars in settlements. *AF Holdings v. Does 1-1058,* 752 F.3d 990, 992-993 (D.C. Cir. 2014); *Mick Haig Productions v. Doe*, 687 F.3d 649, 652 & n.2 (5th Cir. 2012). Even ordinary people who did no more than create home wi-fi networks and fail to encrypt them are easily bullied into paying not to be identified. These abuses provide yet another reason why strict standards should be applied to such subpoenas.

Hadeed's subpoena invoked judicial authority to compel a third party to provide information. A court order, even when issued at the behest of a private party, is state action and hence is subject to constitutional limitations. Consequently, an action for damages for defamation, even when brought by an individual, must satisfy First Amendment scrutiny, *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964), and injunctive relief, even to aid a private

party, is similarly subject to constitutional scrutiny. *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971). 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.

> If Internet users could be stripped of . . . anonymity by a civil subpoena enforced under the liberal rules of civil discovery [without a factual showing], this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights.
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> *Doe v. 2theMart.com*, 140 F. Supp.2d 1088, 1093 (W.D.Wash. 2001).

II. The Consumer Reviews Here Are Not Commercial Speech. (Assignment of Error 4)

The court below afforded the consumer reviews something less than full First Amendment protection because of its erroneous assumption, addressing an issue not raised by either party, that the criticisms of Hadeed were commercial speech. App. 212-213 & n. 4. However, criticism of a commercial product or service is not commercial speech simply because it might injure the plaintiff's business interests. *CPC Int'l v. Skippy Inc.*, 214 F.3d 456, 462-463 (4th Cir. 2000)*; Nissan Motor v. Nissan Computer*, 378 F.3d 1002, 1017 (9th Cir. 2004). *See also Bose Corp. v. Consumers Union*,

466 U.S. 485 (1984) (applying full First Amendment protection to review of a consumer product).

Commercial speech is "usually defined as speech that does no more than propose a commercial transaction." *United States v. United Foods*, 533 U.S. 405, 409 (2001). The defendants criticized Hadeed's services but did not propose their own services or any others. The reasoning below that these statements merited a more "limited measure of protection" was wrong, and casts doubt on the court's entire analysis.

III. Courts Require a Detailed Legal and Evidentiary Showing for the Identification of John Doe Defendants Sued for Criticizing the Plaintiff. (Assignments of Error 1-8)

The fact that a plaintiff has sued over certain speech does not create a compelling government interest in taking away a defendant's anonymity. The challenge for courts is to find a standard that makes it neither too easy nor too hard to identify anonymous speakers. Setting the bar "too low will chill potential posters from exercising their First Amendment right to speak anonymously. The possibility of losing anonymity in a future lawsuit could intimidate anonymous posters into self-censoring their comments or simply not commenting at all." *Cahill*, 884 A.2d at 457.

A. The Court Should Adopt a *Dendrite* Standard to Ensure Protection of Anonymous Speech in Virginia. (Assignments of Error 1-2, 5-6)

Although the issue is one of first impression in Virginia, appellate courts in about a dozen other states have confronted the showing that the First Amendment requires before anonymous Internet speakers who have been sued for allegedly wrongful speech may be identified pursuant to subpoena. Each of these courts have recognized that the proper standard for adjudicating such controversies depends on striking the right balance between the interests of plaintiffs in gaining redress for allegedly tortious speech and the interests of the accused speakers in defending their First Amendment right to speak anonymously. If the identification burden is too high, then online wrongdoers can hide too easily behind pseudonyms to engage in libel and other wrongs with immunity. But if the burden is too low, companies or political figures that face speech that they do not like will too easily be able to strike back at their critics, enabling them to initiate extrajudicial self-help as soon as the critics are identified, and creating a serious chilling effect that can deter other potential critics and thus deprive the marketplace of ideas of the important information and opinions that some may be motivated to express only if they can be confident that they can maintain their privacy so long as their speech is **not** actionable.

In *McIntyre*, the Supreme Court said that only a compelling government interest can overcome the right to speak anonymously. 514 U.S. at 348.[4] Thus, the outcome of this case turns on whether the mere filing of a complaint that states a cause of action creates a compelling government interest, or whether more is required.

The opinion below suggested that the other states have reached widely varying results on this point, but although each state court has worded its opinion slightly differently, there is a remarkable uniformity in the standards adopted elsewhere. Following the lead of the first state appellate court to address the question (and the case that lends its name to the standard), *Dendrite v. Doe*, 775 A.2d 756 (N.J. App. 2001), appellate courts in Arizona, California, Delaware, Indiana, Maryland, New Hampshire, Jersey, Pennsylvania, and Texas, as well as the District of Columbia, have each joined New Jersey in holding that a plaintiff cannot obtain the identity of a defendant who is alleged to have engaged in wrongful speech unless the plaintiff can present admissible evidence of the elements of the cause of

[4]Similarly, the *Report on the Discovery of Electronic Data* cited by the court below deemed the applicable constitutional standard to be "exacting scrutiny" that allows an "intrusion on protected interests only if it is narrowly tailored to serve an overriding interest requiring disclosure." App. 261.

action that the plaintiff alleges.[5] That is the test that the Court should adopt here, which is consistent with Va. Code § 8.01-407.1 and protects the interests of both anonymous speakers, and plaintiffs, in Virginia.

In the defamation context, the test requires evidence of falsity and, depending on state law, evidence of damages. Two other states have construed their own court rules either to demand evidence before the subpoena can be sought or, at least, to give the anonymous defendant the opportunity to obtain a protective order unless such evidence is provided.[6] Six of the ten states apply an equitable balancing test, analogous to a preliminary injunction standard, even if the plaintiff meets the test of presenting minimal

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[5] *In re Indiana Newspapers,* 963 N.E.2d 534 (Ind. App. 2012); *Pilchesky v. Gatelli*, 12 A.3d 430 (Pa. Super. 2011); *Mortgage Specialists v. Implode-Explode Heavy Indus.*, 999 A.2d 184 (N.H. 2010); *Solers, Inc. v. Doe*, 977 A.2d 941 (D.C. 2009); *Independent Newspapers v. Brodie*, 966 A.2d 432 (Md. 2009); *Krinsky v. Doe 6*, 72 Cal. Rptr.3d 231 (Cal. App. 2008); *In re Does 1-10*, 242 S.W.3d 805 (Tex. App. 2007); *Mobilisa v. Doe,* 170 P.3d 712 (Ariz. App. 2007); *Doe v. Cahill,* 884 A.2d 451 (Del. 2005).

[6] In Illinois, the lead case is *Maxon v. Ottawa Pub. Co.*, 929 N.E.2d 666 (Ill. App. 3d Dist. 2010). In Michigan, the first panel to address the question chose to address the issue only under the state rules of court, *Thomas M. Cooley Law School v. Doe 1*, 833 N.W.2d 331 (Mich. App. 2013); the second panel endorsed the *Dendrite* approach and invited the Michigan Supreme Court to resolve the difference. *Ghanam v. Does*, 845 N.W.2d 128 (Mich. App. 2014), *petition for appeal pending*.

evidence of the elements of the cause of action.[7] Federal courts have repeatedly followed *Cahill* or *Dendrite*, even in states that have not addressed the issue.[8]

Virginia now stands alone as the only state whose jurisprudence has declined to protect the First Amendment anonymous-speech rights of Internet speakers by demanding evidence before compelling disclosure of identifying

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[7] *Dendrite, supra; Independent Newspapers*, *supra*; *Indiana Newspapers, supra; Mortgage Specialists, supra; Mobilisa, supra; Pilchesky, supra.*

[8] *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"); *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) (same); *Koch Industries v. Doe*, 2011 WL 1775765 (D. Utah May 9, 2011) ("The case law . . . has begun to coalesce around the basic framework of the test articulated in *Dendrite*," *quoting SaleHoo Group v. Doe*, 722 F. Supp.2d 1210, 1214 (W.D. Wash. 2010)); *Best Western Int'l v. Doe*, 2006 WL 2091695 (D. Ariz. July 25, 2006) (five-factor test drawn from *Cahill*, *Dendrite,* and others); *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). In *In re Anonymous Online Speakers*, 661 F.3d 1168 (9th Cir. 2011), the Ninth Circuit declined to set a uniform standard, ruling that the proper approach depended on the nature of the speech at issue.

information. If the Court of Appeals decision stands, and a business is able to identify its critics by doing no more than representing that it cannot recognize who is behind a pseudonym, consumers and others who have valuable contributions to make to public debate, but who worry about retaliation, will be chilled into silence.

B. The *Dendrite* Standard Allows Legitimate Claims to Proceed. (Assignments of Error 1, 5)

Courts applying the *Dendrite* standard have been careful to ensure that it does not prevent plaintiffs with meritorious claims from proceeding. They generally do not require plaintiffs to present evidence on elements of a prima facie case for defamation that generally cannot be proved without the opportunity to take the defendant's deposition, such as actual malice. *E.g.*, *Doe v. Cahill*, 884 A.2d at 464. Many plaintiffs have succeeded 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 (2001), a companion case to *Dendrite*, the court ordered that the anonymous speaker be identified. In *Dendrite* itself, two of the Does were identified while two were protected against discovery. And even if a plaintiff does not meet the standard in its first motion to enforce, it can bring a second motion

supported by sufficient evidence so long as basis for denial of discovery was not that the allegedly defamatory statements were held not actionable as a matter of law.

C. The *Dendrite* Approach Is Consistent with Va. Code § 8.01-407.1. (Assignments of Error 2-3, 5)

The Court of Appeals relied heavily on the argument that the Virginia Legislature had deliberately refused to follow the example of other states that require an evidentiary showing that the lawsuit has potential merit. The panel therefore believed that embracing Yelp's position required a ruling that section 8.01-407.1 is unconstitutional, a decision the panel refused to make because of the presumption in favor of constitutionality. There are several flaws in this argument.

First, the court below was wrong in deciding that the adoption of section 8.01-407.1 represented a policy choice to reject "persuasive authority from other states." App. 223. The court relied in large part on the *Report on the Discovery of Electronic Data* that was presented to the legislature and that "canvasses the existing caselaw directly on the topic." App. 217.[9] In fact, the report was finished in 2001 (App. 236, dated November 30, 2001), long before

[9]The report was not cited in the circuit court but was discussed in the Court of Appeals. It appears in the Joint Appendix at 235-330.

the national consensus standard developed requiring prima facie evidence supporting the claim, and not just a facially valid complaint. The report remarked on the "absence of fully articulated . . . case law," App. 260, lamented that "no state or federal appellate court has yet endorsed a particular formulation," App. 261, and said that outside Virginia, "only two 'tests' have been reported," App. 263, citing a 1999 federal trial court decision (since superseded by *Highfields Capital Mgmt. v. Doe*, 385 F. Supp.2d 969 (N.D. Cal. 2005), which endorsed *Dendrite*) and one state trial court decision (in *Dendrite*, even though it was the later **appellate** decision in *Dendrite* that adopted the requirement that evidence be presented). The report did not mention any test requiring evidence; hence, the assumption that the Legislature's consideration of this report implies a rejection of that test was erroneous.

Indeed, in formulating proposed "procedural legislation" to aid the courts in resolving disputes about subpoenas to identify anonymous Internet speakers, App. 262, the report did not suggest that the statute would supplant the proper constitutional standards for adjudication. Rather, the expectation was that the statute would "supply the appropriate courts with information necessary to decide **whatever** issues constitutional and tort law make relevant on the question of revealing the identities of anonymous

communicators," *id.* (emphasis in original), recognizing "the risk that as case law matures through the appellate process, different or additional considerations will be identified." *Id.* In 2014, the case law has matured and the Court should not read section 8.01-407.1 as limiting its treatment of the constitutional standards for subpoenas to those considerations presented by the case law at the turn of the century.

Second, state and federal statutes, and the Constitution, often provide alternate bases for individuals to assert rights against government action. For example, public employees may be protected against racial discrimination, or against retaliation based on the exercise of the right to criticize a public official or to "blow the whistle," under state statutes, federal statutes, and the First or Fourteenth Amendment. In many states, journalists enjoy protection against disclosure of sources, notes and out-takes under a state shield statute as well as the First Amendment. When the Constitution provides protection even though the state statute does not, the court need not hold the state statute unconstitutional; if the federal statute protects but the state statute does not, the state statute need not fail under the Supremacy Clause. These different state and federal sources of authority can coexist without conflicting; they simply offer alternate paths to relief. So, here, a court can find that the First Amendment affords protection against a subpoena even though § 8.01-407.1

does not, without declaring section 8.01-407.1 unconstitutional.

Third, the language of § 8.01-407.1 can easily be read as incorporating the evidence requirement that other states have held to be required by the First Amendment. Under section 8.01-407.1(A)(1)(a), plaintiffs seeking discovery must show

> that one or more communications that are or may be tortious or illegal have been made by the anonymous communicator, or that the party requesting the subpoena has a legitimate, good faith basis to contend that such party is the victim of conduct actionable in the jurisdiction . . ..

Each of these prongs replicates what courts in other states have accomplished by their evidence-requiring First Amendment balancing test. Under subsection (a)'s second prong, it is not enough for the plaintiff to show good faith; it must show a "legitimate" basis for claiming that the speech was tortious. That requirement is entirely consistent with the rule in other states that plaintiffs seeking relief must show evidentiary bases for their claims.

Indeed, if such evidence were not required, the statute would require no more than the filing of a complaint to satisfy the "good faith" element of the second prong. As a recent circuit court ruling noted while trying to apply the decision below:

> [A]ll signed complaints have a good faith argument, or basis, that the Plaintiff is the victim of conduct actionable in the jurisdiction where the suit is filed. Therefore, simply by signing a complaint

> Plaintiff would satisfy the second subpart of *Yelp*. If this were the case all signed pleadings would always override First Amendment considerations because the signed pleadings would meet the requirements of the second subpart of *Yelp*. This Court is unwilling to allow such a casual disregard of a fundamental right.
>
> *Geloo v. Doe*, 2014 WL 2949508, *5 (Va. Cir. June 23, 2014).

Similarly, the first prong's words "are or may be tortious" parallel the principles that underlie the analysis in *Dendrite* and similar cases, using the existence of evidence of falsity and damages to test whether the plaintiff has a realistic claim or only an imaginary one. In addition, under subsection (b) of § 8.01-407.1, the plaintiff must show that identifying information is "centrally needed to advance the claim," or relates to a "core claim or defense," or is "directly and materially related to that claim." If the plaintiff bringing a defamation claim does not even have evidence that a statement about the plaintiff is false, or that the statement has caused damage to its business reputation, then the identifying information is not "centrally needed" or "directly and materially related" to the claim—the claim could still not succeed even if the identifying information were obtained. Thus, this additional requirement parallels the *Dendrite* standard for adjudicating subpoenas.

D. Applying the Proper First Amendment Standard and Section 8.01-407.1, Hadeed's Subpoena Should Have Been Quashed. (Assignments of Error 5, 6, 8)

The majority found that Hadeed provided sufficient support for the

subpoena by its counsel's simply asserting "belief" that the Does were not actual customers, just because Hadeed could not be sure which customers had posted the reviews. As Judge Haley pointed out in dissent, Hadeed never denied the substance of the Does' reviews—*e.g.*, that despite its ubiquitous $99 coupon offers, Hadeed actually charges more for carpet cleaning. Hadeed's reputation is not affected by whether reviewers are customers or not—it is only the possible falsity of the bait-and-switch allegations, repeated in other unchallenged Yelp reviews, that could hurt Hadeed's reputation. Yet the First Amendment requires a libel plaintiff to prove not just literal falsity but also **material** falsity. *Air Wisconsin Airlines Corp. v. Hoeper*, 134 S.Ct. 852, 861-862 (2014), *citing Masson v. New Yorker Magazine*, 501 U.S. 496, 517 (1991). Moreover, a false statement that someone was a Hadeed customer is not defamation per se, hence damage to Hadeed's reputation cannot be presumed; Hadeed would have to prove special damages. *Fleming v. Moore,* 221 Va. 884 (1981). Not only was there no evidence of falsity, but there was no evidence of special damages.

Nor did Hadeed ever explain what characteristics of its customer database permitted it to determine that each of the seven Doe defendants was not, or even might not be, a customer, considering that it could not take at face value either the posting name, likely pseudonyms, or the posting

location, which need not be currently accurate. On remand, the trial court can give Hadeed the opportunity to make a showing of details in the postings that could enable Hadeed to be certain that none of the Does was a customer. But without such evidence, the trial court allowed Hadeed to obtain personal information about its critics simply because it wants to know who they are. Considering that the legislature adopted an elaborate procedure for justifying subpoenas to identify anonymous speakers, it is hard to see how enforcing the subpoena in this case, on this record, is consistent with the legislature's intent in adopting § 8.01-407.1, not to speak of with the First Amendment.

The lower court's application of the anonymity standard to this case also erred with respect to the standard of review. Both parties recognized below that Yelp's argument that enforcement of the subpoena violated the First Amendment had to be reviewed independently based on the record as a whole. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 505-511 (1984). Even if the reviews at issue were commercial, as the court below erroneously ruled, *Bose* review applies in commercial speech cases. *Peel v. Attorney Registr. and Disc. Comm.*, 496 U.S. 91, 108 (1990). The court below, however, affirmed the trial court by repeatedly applying an abuse of discretion standard of review. App. 224, 226, 227, 228. Indeed, because they turn on the First Amendment, as well as on the meaning of § 8.01-407.1, each of the first eight

Assignments of Error is subject to such independent or de novo review.

* * * *

At bottom, Hadeed contends that it is entitled to identify its critics, and that if a given critic uses a successful pseudonym, the very decision to conceal identity entitles Hadeed to discovery. That argument is fundamentally inconsistent with the First Amendment right to speak anonymously and with section 8.01-407.1. The order compelling Yelp to comply with Hadeed's subpoena should be overturned.

II. THE TRIAL COURT LACKED JURISDICTION TO SUBPOENA DOCUMENTS FROM YELP. (Assignment of Error 9)

The court below held that the Virginia courts had jurisdiction to compel Yelp to bring documents from its San Francisco headquarters to Alexandria in response to Hadeed's subpoena because section 8.01-201 of the Virginia Code allows a foreign corporation authorized to do business in Virginia to be served through its registered agent. The court's theory was that Code § 13.1-766 allows service on a registered agent of any process "required or permitted by law to be served upon the corporation," and that a subpoena is "process" under *Bellis v. Commonwealth*, 241 Va. 257 (1991). But none of these authorities address the issue of jurisdiction, any more than the fact that a summons may be served on a foreign corporation through a registered agent

obviates the need to find personal jurisdiction under the state's long-arm statute. In fact, using a Virginia court to compel a non-party foreign corporation to produce documents located elsewhere simply because it has an in-state registered agent runs counter to established law whereby the procedure for obtaining evidence from non-party foreign corporations is to obtain a commission to the court of the corporation's own jurisdiction. As the Court of Appeals recognized, this issue is one of law that is reviewed de novo. App. 228

The court below noted that Yelp's online services are available in Virginia, but predicating jurisdiction—whether personal jurisdiction or subpoena jurisdiction—on the mere fact that Yelp enables consumers to make statements accessible in Virginia through the Internet offends traditional principles of state sovereignty:

> [T]he Internet is omnipresent—when a person places information on the Internet, he can communicate with persons in virtually every jurisdiction. If we were to conclude as a general principle that a person's act of placing information on the Internet subjects that person to personal jurisdiction in each State in which the information is accessed, then the defense of personal jurisdiction, in the sense that a State has geographically limited judicial power, would no longer exist. The person placing information on the Internet would be subject to personal jurisdiction in every State.
> * * *
> In view of the traditional relationship among the States and their relationship to a national government with its nationwide judicial authority, it would be difficult to accept a structural arrangement

> in which each State has unlimited judicial power over every citizen in each other State who uses the Internet.
>
> *ALS Scan v. Digital Service Consultants*, 293 F.3d 707, 712-713 (4th Cir. 2002).

So far as counsel have been able to discover, every state that has addressed the question has held that it lacks jurisdiction to subpoena non-party individuals and companies located outside the borders of the state to produce documents located outside the state.[10] That is why every state has adopted some version of the Uniform Interstate Depositions and Discovery Act ("UIDDA"), providing procedures for domestic subpoenas in aid of litigation in different states. In Virginia, the relevant Virginia Code sections are 8.01-412.8 *et seq.* California has made it particularly easy for out-of-state

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[10] *Ulloa v. CMI, Inc.,* 133 So.3d 914 (Fla. 2013); *Colorado Mills v. SunOpta Grains & Foods*, 269 P.3d 731, 733-734 (Colo. 2012); *Laverty v. CSX Transp.*, 956 N.E.2d 1 (Ill. App. 2010); *Syngenta Crop Protection v. Monsanto Co.*, 908 So. 2d 121 (Miss. 2005); *In re National Contract Poultry Growers' Ass'n*, 771 So. 2d 466 (Ala. 2000); *Craft v. Chopra*, 907 P.2d 1109, 1111 (Okla. Civ. App. 1995); *Phillips Petroleum Co. v. OKC Ltd. P'ship*, 634 So.2d 1186, 1187-1188 (La. 1994); *Armstrong v. Hooker*, 661 P.2d 208, 209 (Ariz. App. 1982); *John Deere Co. v. Cone*, 124 S.E.2d 50, 53 (S.C. 1962). *See also Cates v. LTV Aerospace Corp.*, 480 F.2d 620, 623-624 (5th Cir. 1973) (subpoena cannot command production of documents in federal district court different from the one in which the documents are maintained); *Chessman v. Teets*, 239 F.2d 205, 213 (9th Cir. 1956), *rev'd other grounds,* 354 U.S. 156 (1957) (same); *Wiseman v. American Motors Sales Corp.*, 479 N.Y.S.2d 528 (N.Y. App. Div. 1984) (trial court subpoena to non-party witness could not be enforced; proper procedure is to secure commission to seek discovery under authority of court in witness's own state).

parties to obtain California process in aid of civil suits in their own jurisdictions by providing that a request for an issuance of a subpoena in aid of out-of-state proceedings "does not constitute making an appearance in the courts of this state," California Code of Civil Procedure § 2029.300(a), and hence may be effected by the party's out-of-state attorney. These provisions would rarely be needed if Hadeed's expansive notions of subpoena jurisdiction were sound, expanding Virginia's power to subpoena anybody who communicates through Internet web pages accessible in Virginia and to any company that is engaged in interstate commerce including Virginia.[11]

The fact that Yelp complies with Virginia law by registering an agent for service of process, so that it can easily be served when jurisdiction exists, does not create subpoena jurisdiction in Virginia. Several courts have expressly rejected the proposition that having a registered agent for service of process subjects the corporation to subpoena jurisdiction that would not otherwise exist. *Ulloa v. CMI, Inc.,* 133 So.3d at 920; *Ariel v. Jones*, 693 F.2d 1058, 1060-1061 (11th Cir. 1982). For example, in *Syngenta Crop Protection v. Monsanto Co.*, 908 So. 2d 121, 128 (Miss. 2005), reviewing a statute

[11] Under *Daimler AG v. Bauman*, 134 S. Ct. 746, 749 (2014), even "a substantial, continuous, and systematic course of business" in Virginia would not be enough to subject Yelp to general jurisdiction here.

virtually identical to Virginia Code § 13.1-766, the court said "[t]here is no doubt that the statutory language stating that a foreign corporation's registered agent is that corporation's agent 'for service of process, notice or demand required or permitted by law to be served on the foreign corporation,' does not authorize a party's service of a subpoena duces tecum upon nonresident nonparties." Similarly, in *Phillips Petroleum Co. v. OKC Ltd. Partnership*, 634 So.2d 1186, 1187-1188 (La. 1994), the court said, "A principal consequence of designating an agent for service of process is to subject the foreign corporation to jurisdiction in a Louisiana court. Finding CKB subject to the personal jurisdiction of Louisiana courts, however, does not necessarily mean that this Texas corporation is bound to respond to a subpoena, duly received, by having to appear and produce documents in a Louisiana court in a lawsuit in which they are not a party."

It was the tradition of limiting subpoena jurisdiction over foreign corporations, and requiring litigants to use UIDDA, that compelled the plaintiffs in *AOL v. Nam Tai Electronics*, 264 Va. 583 (2002), and *AOL v. Anonymous Publicly Traded Co.*, 261 Va. 350 (2001), to obtain Virginia process to compel disclosures by America Online ("AOL"), a Virginia company, instead of compelling AOL to produce identifying information through process from the California and Indiana courts, respectively. Indeed,

although not passing on the issue of subpoena jurisdiction, because it was not the focus of the task before its authors, the *Report on the Discovery of Electronic Data* noted that a Virginia Internet Service Provider could always insist on having the courts of its home state available to adjudicate motions to quash subpoenas to identify its own anonymous users. App. 265. It is precisely this privilege that the courts below have denied to Yelp.

If Virginia walks away from this traditional understanding of the limits of subpoena jurisdiction, other states are likely to do so as well. Virginia businesses would then have to litigate the confidentiality of their own documents in courts far from home, that may be much less deferential to their confidentiality concerns, and much more attentive to the countervailing interests of local businesses or individual litigation adversaries.

The legislature, not the courts, should decide whether to extend Virginia's jurisdiction in that way, risking the possibility that other states may similarly stop according Virginia corporations the privilege of defending the privacy of their own documents in the Virginia courts.

CONCLUSION

The judgment of the Court of Appeals should be reversed, and the case remanded with instructions to reject the subpoena for lack of jurisdiction, or to give Hadeed the opportunity to make a proper evidentiary showing to justify

identifying one or more Doe defendants.

Respectfully submitted,

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July 30, 2014

CERTIFICATE

Pursuant to Supreme Court Rule 5:26, I hereby certify that:

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3. I am causing fifteen paper copies of this brief, and one electronic copy on CD, as well as ten paper copies of the Joint Appendix and ten electronic copies on CD's, to be filed on this date by hand with the Clerk of the Supreme Court, and one paper copy and one electronic copy each of the brief and Joint Appendix, to be sent on this date by UPS Ground to counsel for appellee at the address shown above.

July 30, 2014

Paul Alan Levy