

IN THE  
Supreme Court of Virginia

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RECORD NO. 140242

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**YELP INC.,**

Non-party Respondent-Appellant,

v.

**HADEED CARPET CLEANING, INC.,**

Plaintiff-Appellee.

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**YELP INC.'S REPLY BRIEF**

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## INTRODUCTION

The Court's ruling in this case will set the standard for Virginia courts to follow when adjudicating disputes about the identification of online speakers who have been accused of wrongdoing. An overly lenient standard will encourage frivolous litigation, allowing plaintiffs to silence their critics through the mere **threat** of using judicial power to compel their unveiling.

Hadeed's brief ignores the threat to vital anonymous speech that its arguments embody. Instead, Hadeed asserts that Yelp seeks to invalidate Va. Code § 8.01-407.1, which Yelp has never done. Hadeed proclaims that it has no desire to sue its own customers, although it has already done so. Finally, Hadeed incorrectly contends that Yelp waived jurisdictional objections to the subpoena claims. The Court should reject Hadeed's arguments.

### **I. ENFORCEMENT OF HADEED'S SUBPOENA WOULD VIOLATE THE FIRST AMENDMENT.**

#### **A. Hadeed Has Neither Defended the Lower Court's Reasoning Nor Addressed Yelp's Key Arguments.**

Appellant Yelp Inc.'s opening brief identified several respects in which the Court of Appeals not only undervalued the First Amendment interests at stake in this appeal, but also erroneously concluded that the legislature's adoption of a procedure for litigating subpoenas to identify anonymous Internet speakers required enforcement of the subpoena at issue here,

requiring Yelp to identify seven consumers who recounted bad experiences with plaintiff-appellee Hadeed Carpet Cleaning, Inc.

One remarkable aspect of Hadeed’s responsive brief is how much of the Court of Appeals’ reasoning it abandons—Hadeed defends neither the court’s conclusion that it had no need to find that disclosure serves a compelling interest because criticism of Yelp is necessarily commercial speech (AOE 4), nor the lower court’s use of an abuse of discretion standard (AOE 8). Yelp showed that the Court of Appeals wrongly predicated its construction of section 8.01-407.1 of the Virginia Code, and its rejection of Yelp’s First Amendment argument, on the erroneous assumptions (1) that the legislature had considered and rejected the “evidence-requiring” approach of *Dendrite Int’l v. Doe*<sup>1</sup> and (2) that following *Dendrite* would have required the court to strike down the statute as unconstitutional. Instead, the statute and the First Amendment provide alternate means for protecting the right to anonymous speech, and the statute can be construed as consistent with and indeed incorporating the First Amendment’s protections. AOE 2-3. Hadeed makes no effort to defend the court below by rebutting Yelp’s arguments on either point.

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<sup>1</sup>775 A.2d 756 (N.J. Super. App. Div. 2001).

To be sure, the **assumption** that reversal of the decision below would entail invalidating or changing the statute pervades Hadeed's brief (at 10, 11, 17, 18, 20, 21), but Hadeed's failure to explain why reversal would entail a finding of unconstitutionality speaks volumes to the flaws in its arguments. Indeed, Hadeed argues at some length that the language of the statute and the various prongs of the *Dendrite* test can be reconciled. Hadeed Br. 18-21. Yelp agrees that *Dendrite* and the statute are consistent, and its opening brief explained, with detailed reference to the language of the statute, how the language could be read as incorporating each of the elements that appellate courts in all the other states that have addressed this issue have found based on the First Amendment. Hadeed takes no issue with this explication, and considering that the statute can be read in a way that is consistent with the First Amendment, there is no reason why this Court should not embrace that reading.

**B. Hadeed Errs Both in Disputing the National Consensus Requiring Evidence That a Doe's Speech Was Wrongful, and in Arguing That Virginia Law Bars That Approach.**

Hadeed does argue that one prong of the *Dendrite* approach, although endorsed in every state whose appellate courts have decided the question, would contravene Virginia's statute: the requirement that the proponents of

denying the Doe speakers their First Amendment right to speak anonymously must present evidence in support of their claims. Yelp’s opening brief (at 30-31), articulated several ways in which the language of 8.01-407.1(A)(1)(a) could be read to incorporate a requirement of presenting evidence; Hadeed never engages with those arguments, or shows why the statute can only be read as rejecting a requirement of evidence on such issues as falsity. In addition to the textual arguments in Yelp’s opening brief, section 8.01-407.1(A)(1)(a) requires the party seeking discovery to supply supporting materials that make a “showing” — a term that implies evidence, not merely argument. Nor, indeed, does Hadeed ever explain why, apart from the fact that it made a tactical choice not to offer evidence to the courts below, an evidence requirement would harm legitimate interests of plaintiffs that have valid defamation claims.

Hadeed instead takes issue with Yelp’s argument that *Dendrite* and its progeny represent an “emerging consensus” of how the First Amendment should be applied to the adjudication of subpoenas to identify anonymous speakers. Hadeed cites a passage in the opinion below, and takes out of context a phrase in a student note, to argue that other courts are divided among nine different standards. Hadeed Br. 18. Yelp’s opening brief pointed

out that existence of the linguistic differences among the various appellate opinions should not be allowed to mask how much the opinions have in common. Yelp Br. 23-25, and cases cited in footnotes 5-8. Hadeed never replies to this analysis. Indeed, although the student note that Hadeed invokes said at the page cited that there is a spectrum of other standards, the note (consistent with its title) proceeded to find that there was a fair degree of consensus on the basic aspects of the standard. Note, *Balancing Act: Finding Consensus on Standards for Unmasking Anonymous Internet Speakers*, 51 B.C. L. Rev. 833, 847 (2010). The author specifically found that, as of 2009, “[v]irtually all unmasking standards in the survey also require some evidentiary showing on the merits of the plaintiff’s claim,” *id.* at 851. Since 2010, the degree of consensus on this basic point has only increased. See Yelp’s opening brief at 24 n.5, citing appellate decisions in 2010, 2011 and 2012. The decision below truly stands alone on this point.

**C. Hadeed Belittles Its Customers’ First Amendment Rights and Overstates Its Need for Disclosure on This Record.**

At pages 12-13 of its brief, Hadeed denigrates the right to speak anonymously, implicitly equating customer reviews with pornography and treason while saying that anonymity does not make such speech protected.



It is true enough that such speech is unprotected, but at the stage of the litigation at which decisions have to be made about whether to protect anonymity, the plaintiff has done no more than **allege** that a defendant's speech is unprotected. The *Dendrite* approach that other states follow, and which Virginia's statute does not preclude, allows the courts to ensure that mere allegations are not a sufficient basis for stripping speakers of the right to speak anonymously. In Hadeed's hypotheticals, the wrongful nature of the speech would presumably be self-evident, unlike the content of the consumer reviews at issue here, on which Hadeed admits that there is no independent wrongfulness if the authors are indeed consumers.

Later in its brief, Hadeed apparently agrees that a rule that merchants may always or even ordinarily identify their online critics would be too broad — unmasking, Hadeed concedes, should be compelled only “in exceptional circumstances.” Hadeed Br. 21. Yelp's opening brief noted, in agreement with the dissenting judge below, that Hadeed's proffered basis for showing its need for identifying information about the seven anonymous reviewers had been so scanty that **any** plaintiff could use it, regardless of the merits of its claim. Thus, any merchant who was unable to figure out which of its customers made a given criticism could compel their identification by making

exactly the same contention that Hadeed makes here – that it reviewed its customer database and “found no apparent matches.” Hadeed Br. 22. The fact that Hadeed cannot figure out which of its tens of thousands of customers posted a given critical review is a far cry from providing a legitimate basis for believing that the reviewer was not a customer. The fact that Hadeed cannot match the reviews to any specific customer just means that the seven Doe reviewers in this case may have employed successful pseudonyms, as the First Amendment allows them to do; or it may mean that Hadeed’s records or its review methods are imperfect. Hadeed never supplies a limiting principle to its argument, or explains why its meagre argument for unmasking, if accepted by this Court, would not give every Virginia merchant criticized on the Internet a roadmap for identifying its critics regardless of whether there was any truth to the criticism. That approach would too easily sacrifice the First Amendment rights of Virginia citizens.

Hadeed proclaims that it would never sue its own customers, but of course it has already done so. Yelp pointed out, both in its brief below (at page 6) and in its opening brief in this Court, at 9, citing JA 103, that Hadeed actually admitted on the Yelp web site, as reflected in the Joint Appendix, that defendant M.P. was one of its customers, when it apologized to her for the

overcharge. In a footnote to its brief, Hadeed denies that it apologized to M.P., but the record shows otherwise.<sup>2</sup>

Moreover, three of the defendant reviewers have now filed a brief in this Court in which their counsel represents that the Does were, in fact, Hadeed customers. It is hard to see how Hadeed can maintain the fiction that it would never seek to sue its own customers.

## **II. THE TRIAL COURT LACKED SUBPOENA JURISDICTION OVER YELP'S CALIFORNIA DOCUMENTS.**

Yelp's opening brief showed that every other state that has addressed the issue of jurisdiction to subpoena documents from an out-of-state third-

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<sup>2</sup> As shown on page 103 of the Joint Appendix, Hadeed said this:

we sincerely apologize for the miscommunication with respect to the discount. We are happy we resolved it, and in addition we offer to credit back to you the difference for the cost of the extra washing service, in order to stand behind our guarantee of complete odor removal, extra work is required in certain cases, essentially a second washing, a long and tedious process. If you would kindly call us at 703-836-5111 ask for Mike Hadeed, the credit for this extra service will be arranged.

On May 15, 2013, one week after Yelp filed its brief in the Court of Appeals pointing to the apology to M.P., "Joe H. of Hadeed Carpet" changed Hadeed's response on Yelp's web site to eliminate the apology and implicit admission that M.P. is an actual customer. [http://www.yelp.com/not\\_recommended\\_reviews/hadeed-carpet-alexandria?not\\_recommended\\_start=40](http://www.yelp.com/not_recommended_reviews/hadeed-carpet-alexandria?not_recommended_start=40) (last viewed on September 15, 2014).

party corporation that has documents relevant to the litigation located out-of-state has followed the traditional rule that out-of-state witnesses must be subpoenaed through the courts of their home state, even if the corporation has a registered agent in-state to facilitate service in cases where jurisdiction exists. Hadeed's opposition does not take issue with Yelp's portrayal of the universal approach to this question in other states, and it gives no reason to infer that, by defining subpoenas as a form of process, the Virginia legislature intended to depart from the uniform approach of other states to the issue of subpoena **jurisdiction** over foreign corporations. The Virginia legislature does not "hide elephants in mouseholes" any more than Congress does. See *Whitman v. American Trucking Associations*, 531 U.S. 457, 467 (2001). Instead, Hadeed argues that Yelp waived its objections to subpoena jurisdiction under section 8.01-277 and 8.01-277.1 of the Virginia Code because it supposedly "engaged in conduct relative to adjudicating argued the merits of the case." Br. 31-32.

There are three reasons why Yelp cannot be found to have waived its objections— (1) section 8.01-277 and 277.1 do not apply; (2) Yelp has never attempted to litigate the merits of this case; and (3) everything Yelp did was simultaneous or subsequent to raising the jurisdictional defect. First, section

8.01-277 applies only to a person “upon whom process to answer any action has been served,” and requires the person to raise the defect in service of jurisdiction “prior to or simultaneously with the filing of any pleading to the merits.” But Yelp has not been served with any process to answer any action because it is not a party in this case. Indeed, Hadeed could not have lawfully named Yelp as a party to its defamation action because federal law makes Yelp immune from suit over state-law claims premised on its publication of user-created content. *Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997). And even if the Court were to treat Yelp’s arguments about whether the subpoena violated the First Amendment as being “relative to adjudicating the merits of the case,” Yelp asserted lack of jurisdiction in its very first filing. Therefore, its First Amendment arguments were offered simultaneously with, and after, the jurisdictional arguments had been presented.<sup>3</sup>

Finally, there was no waiver of jurisdictional objections because Yelp engaged in no conduct relative to litigating the merits. Everything that Yelp

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<sup>3</sup>Hadeed apparently argues that Yelp’s jurisdictional arguments, although presented in its very first court filing, JA 7-9, are unworthy of consideration because the arguments were not made in a document captioned “motion to quash.” What Yelp filed with the trial court was a copy of its letter to Hadeed’s counsel, raising jurisdictional and constitutional objections to the subpoena pursuant to section 8.01-407.1(A)(4), and was the functional equivalent of a motion to quash the subpoena.

has argued related only to whether a subpoena to a third-party needs to be pursued in California rather than Virginia, and whether the subpoena is consistent with the First Amendment, not to the merits of the litigation.

Most of the rest of Hadeed's arguments in favor of jurisdiction go to matters that are not at issue. For example, Hadeed argues that Yelp does some business in the state and hence it would not be a violation of Fourteenth Amendment Due Process for a plaintiff to sue Yelp on causes of action growing out of its business activities in the state. Br. 29-30. But Hadeed conflates subpoena jurisdiction over third parties with personal jurisdiction over parties. Yelp fully acknowledges that it conducts some business in Virginia – that is why it has a registered agent here. But Yelp is not subject to general jurisdiction in Virginia, and just as tag jurisdiction would be an improper way to subject it to general personal jurisdiction based on the fortuity that one of its executives travels through the state, *Martinez v. Aero Caribbean*, — F.3d —, 2014 WL 4100585 (9th Cir. Aug 21, 2014), so too holding it subject to general jurisdiction just because it has a registered agent in Virginia would be improper. If the presence of a registered agent were enough to make a non-resident company “present” in Virginia and hence amenable to state compulsion regardless of whether any statute affords

jurisdiction, merely doing enough business to warrant selection of a registered agent would always make a foreign corporation subject to general personal jurisdiction even though Virginia's long-arm statute authorizes personal jurisdiction only in more limited circumstances. Va. Code Ann. § 8.01-328.1.

Hadeed argues at some length that holding Yelp subject to specific personal jurisdiction under the Due Process clause would be consistent with the Fourth Circuit's holding in *ALS Scan v. Digital Service Consultants*, 293 F.2d 707 (2002), Br. 27-29, but Yelp did not cite *ALS Scan* for its discussion of the Fourteenth Amendment, but rather for its articulation of the traditional understanding that states have limited authority over non-residents, and that extending authority to non-residents that have no voice in the state's policies would have serious untoward consequences. It is true that, as Hadeed argues, Br. 33, this Court cannot control what other states do about subpoenas to Virginia businesses that engaged in interstate commerce and have resident agents elsewhere. Still, Hadeed does not and cannot deny that if Virginia departs from the traditional understanding embraced by all other states, that subpoenas to non-party witnesses resident outside the state, for documents located outside the state, must be sought through procedures that honor comity, it will give other states a good reason to depart from the

traditional system as well. Such policy decisions, and weighing the consequences of Virginia's being the first state to reject the traditional rule, are tasks best left to the legislature.

## **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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## 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, to be filed on this date by hand with the Clerk of the Supreme Court, and to be sent on this date by UPS Ground to counsel for appellee at the address shown above.

September 24, 2014

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Paul Alan Levy