IN THE SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH DISTRICT

Nos. 2115 WDA 2000 & 2116 WDA 2000

JOAN MELVIN,

Appellee,

v.

JOHN DOE, *ET AL.*,

Appellants.

BRIEF AMICUS CURIAE OF AMERICA ONLINE, INC.

Appeal from Order Dated November 15, 2000
by the Court of Common Pleas of Allegheny County, Pennsylvania (Wettick, J.)
Civil Division No. GD99-10264

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STATEMENT OF INTEREST OF AMICUS CURIAE AMERICA ONLINE, INC.

AOL's interest in this case stems both from its general interest as the world's largest interactive computer service provider in the appropriate legal standards for compelled disclosure of identity information about otherwise anonymous online speakers (including AOL's subscribers) and from its particular involvement in previous proceedings in this matter.

AOL provides an interactive computer service to over 27 million subscribers. This service permits subscribers to access the public Internet and World Wide Web, as well as online content available only on AOL's proprietary system. Moreover, AOL subscribers are able to speak out on any of a plethora of online sites established for the free exchange of ideas. These sites, which include web pages, message boards, chat rooms, and bulletin boards, enable users to offer their thoughts to all who care to read them and to respond to postings made by others.[1/]

To become an AOL subscriber, a person must register with AOL and agree to pay a monthly fee. During AOL's registration process, these subscribers provide AOL with certain basic identity information (e.g., name, address, and credit card or other payment information). A subscriber also chooses one or more "screen names" or pseudonyms — which may or may not bear any resemblance to his or her actual name — for use in connection with the account. The screen name in effect becomes the name by which the subscriber is known online

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[1/] Web pages are online areas in which individuals can "publish" content that is available for viewing and use through the World Wide Web. Message boards and bulletin boards are sites on the Internet or on proprietary online services where users can post messages to be read later by others. Chat rooms are electronic fora in which multiple users may conduct real-time, computer-to-computer conversations with statements of each speaker momentarily appearing on the screens of each participant.

(although of course a subscriber may choose to disclose his or her real name in any online interaction). Thus, much, if not most, of the speech on the Internet and on AOL's service is pseudonymous in nature: the reader of a posting on a message board, for example, typically will know only the poster's screen name.

In general, AOL can, through its customer records, connect a particular screen name of an AOL user with the identity information that was provided to AOL during the registration process for the account associated with that screen name. However, in order to protect the privacy and free speech interests of its subscribers, AOL has adopted and published a Privacy Policy under which AOL generally will not disclose such identity information in the absence of proper legal process, such as a valid subpoena. Due in part to its large user population, AOL receives a tremendous number of such subpoenas on a regular basis. In the year 2000, for example, AOL received approximately 475 civil subpoenas, the vast majority of which sought identity information about an AOL subscriber with a particular screen name. In other words, AOL was subpoenaed to reveal such identity information *on average more than once every day*.

AOL therefore has a strong interest in the establishment of appropriate legal standards for the issuance and enforcement of subpoenas that seek identity information about anonymous online speakers. AOL's interests are focused in three areas:

- AOL greatly values the privacy and free speech interests of its subscribers and is committed to protecting those interests. As noted above, AOL has adopted a Privacy Policy providing that it will not release identity information in the absence of *valid* legal process. Unlawful issuance or enforcement of a subpoena therefore would disrupt the commercial understanding between AOL and its members and may lead to a loss of present and future business. *See In re Subpoena Duces Tecum to America Online, Inc.*, Misc. Law No. 40570, 2000 WL 1210372 at *5 (Va. Cir. Ct. 2000) ("It can not be seriously questioned that those who utilize the 'chat rooms' and 'message boards' of AOL do so with an expectation that the anonymity of their postings and communications generally will be protected. If AOL did not uphold the

confidentiality of its subscribers . . . one could reasonably predict that AOL subscribers would look to AOL's competitors for anonymity. As such, the *subpoena duces tecum* [seeking the identity of an AOL subscriber] potentially could have an oppressive effect on AOL.") (attached hereto as Attachment B).[2/]

- Having to monitor and respond to such a large volume of subpoenas imposes a tremendous resource burden on AOL both in terms of costs and personnel. Thus, AOL has a great interest in ensuring that subpoenas and related legal processes are not abused and are instead issued and enforced only in connection with legally redressable injuries.

- AOL obviously would like to encourage the continued growth and development of the Internet and other online fora. AOL strongly believes that the ability of users to speak and interact on a pseudonymous and anonymous basis increases the diversity and value of online discourse and debate. Accordingly, AOL has an interest in ensuring that such speech is not chilled — and that the growth of the online medium is not stunted — by potential abuse of legal processes to compel disclosure of the identities of anonymous online speakers.

In addition to its interests in the general issue of the appropriate legal standards for compelled disclosure of the identities of online speakers, AOL has a particular interest in this specific proceeding. As set forth below in the Statement of the Case, Plaintiff Melvin initially filed her defamation action against a John Doe defendant in the Loudoun County Circuit Court in Virginia. Melvin subsequently caused the court to issue a subpoena directing AOL to provide identity information concerning the Doe defendant. The Doe defendant, appearing anonymously through counsel, successfully moved to dismiss the case for lack of jurisdiction in the Virginia court. *See Melvin v. Doe,* 1999 WL 551335 (Va. Cir. Ct. June 24, 1999). Accordingly, AOL was not required to respond to the subpoena at that time. Melvin subsequently filed this lawsuit in Pennsylvania against multiple Doe defendants and once

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[2/] *See generally NAACP v. Alabama,* 357 U.S. 449, 459-60 (1958) (recognizing a legally cognizable interest in an association protecting the privacy of its membership due to "[t]he reasonable likelihood that the Association itself through diminished financial support and membership may be adversely affected if production [of identity information] is compelled").

again issued a subpoena to AOL seeking the names of those defendants. The outcome of this appeal will determine whether the identities of the Doe defendants must be revealed.

In view of these interests, AOL wishes to participate in this matter as amicus curiae pursuant to Rule 531 of the Pennsylvania Rules of Appellate Procedure.

STATEMENT OF JURISDICTION

Amicus Curiae AOL adopts Appellant Does' statement of jurisdiction.

SCOPE AND STANDARD OF REVIEW

Amicus Curiae AOL adopts Appellant Does' statement of the scope and standard of review.

ORDERS IN QUESTION

The Court of Common Pleas of Allegheny County issued an Opinion and two Orders that give rise to Does' Appeal and this Amicus Curiae Brief. A copy of the Opinion dated November 15, 2000, is attached hereto as Attachment A pursuant to Rule 2111(b) of the Pennsylvania Appellate Rules of Procedure. This Opinion has not been published in any reporters.

The Court entered two Orders pursuant to its Opinion. The first read as follows:

> On this 14th day of November, 2000, it is hereby ORDERED that defendants' Motion for Summary Judgment is denied.

In the second Order, the Court held as follows:

> On this 15th day of November, 2000, it is ORDERED that:
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> (1) except as provided for in paragraph (2), defendants' motion for a protective order is denied; and
>
> (2) discovery related to the identity of the defendants shall be subject to a confidentiality order, which the parties shall prepare, consistent with the Opinion which accompanies this court order.

STATEMENT OF QUESTION INVOLVED

Did the trial court properly determine that, in view of the significant First Amendment protection accorded to anonymous speech, a plaintiff should be able to unmask the identity of an anonymous online speaker only after demonstrating that the alleged claims are legally viable?

STATEMENT OF THE CASE

Plaintiff Melvin initially filed her defamation action against a John Doe defendant in the Loudoun County Circuit Court in Virginia on March 15, 1999. The suit alleged that the John Doe had published defamatory statements concerning Melvin on a website (www.members.aol/grantst99/politics) that the Doe had created through the AOL service. After filing suit and before service of process on the defendant, Melvin caused the Virginia court to issue a subpoena duces tecum directing that AOL produce "[a]ll documents which identify the individual or entity who owns, leases or subscribed to AOL to open the website" at issue in this case. After AOL provided notice of the subpoena to the AOL subscriber whose account was used to establish the website, the Doe defendant made a special appearance in the Virginia court (anonymously through counsel) for purposes of challenging the jurisdiction of that court. The Virginia court granted defendant's motion to dismiss for lack of personal jurisdiction, and accordingly AOL was not required to respond to the subpoena at that time. *See Melvin v. Doe*, 1999 WL 551335 (Va. Cir. Ct. June 24, 1999).

Melvin subsequently filed this lawsuit in Pennsylvania against multiple Doe defendants (the complaint alleged that the additional Doe defendants had conspired with John Doe in publishing the purportedly defamatory statements on the website). She immediately sought discovery designed to obtain the identity of the Doe defendants, including issuing a subpoena to AOL. Following some preliminary proceedings, the trial court issued the opinion and two orders that are the subject of this appeal. In its Opinion, the trial court agreed with the Doe defendants that the First Amendment and "[f]ederal case law protect[] anonymity for political speech that is not actionably false." *Melvin v. Doe*, No. GD99-10264, slip op. at 6 (Nov. 15, 2000) (hereinafter "Trial Ct. Op."). Moreover, the court recognized that unmasking

the identity of an anonymous speaker may cause the defendants greater injury than any subsequent damages award: "In the present case . . . the punishment which the speaker fears [being forced to give up anonymity] may be inflicted even though the jury ultimately determines that the evidence does not support a defamation finding." *Id.* at 13. Accordingly, the court held that "[a] plaintiff should not be able to use the rules of discovery to obtain the identity of an anonymous publisher simply by filing a complaint that may, on its face, be without merit." *Id.* at 2 n.2. To prevent such a result, the court further held that "plaintiff should not be permitted to engage in discovery to learn the identity of the Doe defendants until the Doe defendants [have] had an opportunity to establish that, as a matter of law, plaintiff could not prevail in this lawsuit." *Id.* at 2.

The trial court concluded, however, that the Doe defendants had failed to demonstrate that Melvin could not prevail as a matter of law and accordingly denied the Doe defendants' motion for summary judgment. In addition, the court found that further proceedings on the merits could not be conducted without disclosure of the Doe defendants' identities because, *inter alia*, that information would be relevant to the factfinder in determining whether the statements at issue were false. *See id.* at 3-4. Accordingly, the court denied the Doe defendants' motion for a protective order and permitted Melvin to engage in discovery seeking the defendants' identity (subject to a confidentiality order).

The Doe defendants appealed to this Court. AOL — while not taking a position on the merits of the summary judgment motion — files this Brief Amicus Curiae urging this Court to approve and endorse the trial court's decision to protect the First Amendment interests in anonymous speech by testing the viability of Melvin's claims as a matter of law *before* requiring disclosure of the Doe defendants' identities.

SUMMARY OF ARGUMENT

The recent proliferation of "John Doe" litigation in which a person subject to anonymous online criticism files suit — sometimes without any viable claim — and seeks to use the power of a court to breach the veil of anonymity threatens to transform judicial processes into instruments for overriding online speakers' First Amendment rights. A long line of cases makes clear that the First Amendment to the United States Constitution protects anonymous speech and that compelled disclosure of the identity of an anonymous speaker is appropriate only if the party seeking such identity information survives a heightened standard of scrutiny. Although in some cases a complaint may meet this standard (by, for example, including clear evidence that an actionable tort has been committed), in many other cases, as the lower court recognized, such John Doe lawsuits are merely pretextual. In these latter cases, the lawsuit serves as little more than a vehicle for abusive discovery unrelated to the pursuit of any viable cause of action.

To guard against that possibility, the court below permitted the John Doe defendants to litigate certain merits issues through the summary judgment stage *before* permitting discovery designed to unmask the defendants' identities. In so doing, the court adopted a solution chosen by a number of courts presented with similar situations. *See, e.g., Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999); *In re Subpoena Duces Tecum to America Online, Inc.*, Misc. Law No. 40570, 2000 WL 1210372 (Va. Cir. Ct. 2000) (attached hereto as Attachment B); *Dendrite International v. John Does*, No. MRS C-129-00 (N.J. Super. Ct. Nov. 23, 2000) (attached hereto as Attachment C). While AOL takes no position as to the lower court's resolution of the underlying merits of the defendants' motion for summary judgment, it urges this Court to approve and endorse the lower court's decision to

test the merits and viability of Melvin's claims before permitting discovery of the John Does' identities. This approach is an essential means for protecting anonymous online speakers' First Amendment rights.

ARGUMENT

I. THE PROLIFERATION OF "JOHN DOE" LAWSUITS IN WHICH PLAINTIFFS SEEK THE IDENTITY OF ANONYMOUS ONLINE SPEAKERS THREATENS TO CHILL FREE AND PROTECTED ONLINE SPEECH.

The explosion of anonymous and pseudonymous speech on the Internet and in other online fora has engendered a growing number of civil cases in which plaintiffs claiming to have been injured by what someone has said under the cover of a pseudonym bring lawsuits designed to unmask and potentially punish the speaker.[3/] Typically, as here, these suits commence as one-sided affairs, with the alleged victim filing a complaint against one or more "John Doe" defendants who are not served because their real identities are not known. The first — and sometimes only — activity in these cases is the issuance of subpoenas to interactive service providers such as AOL that may possess information that can identify, or at least help to identify, the speaker.

While sometimes these "John Doe" lawsuits target speech that was clearly tortious and injurious to the plaintiff, on other occasions these suits can constitute an illegitimate use of the courts to silence and retaliate against speakers whose statements, while unpleasant from the standpoint of the defendant, were not unlawful. Indeed, in one case, a company filed a John Doe suit against a defendant who posted messages on a stock message board alleging that management had "breached their fiduciary responsibility" and urging that the "bastards" be

fired. The company obtained the identity of the Doe through a subpoena and served him with the complaint. The Doe, however, threatened to countersue the company for malicious prosecution, and the company *agreed to pay the Doe* $40,000 to settle the matter. Aaron Elstein, *Defending Right to Post Message: 'CEO Is a Dodo,'* Wall St. J., Sept. 28, 2000, at B1.

Similarly, in a significant number of cases, the complaint seems little more than a vehicle for discovery: some complaints attack messages posted too long ago to be justiciable; others complain of messages that are clear statements of opinion that could not form the basis of a defamation suit;[4/] still others fail even to plead the particular postings that the plaintiff finds offensive.[5/] These factors indicate that the only real objective of some of these lawsuits is identification of the speakers; judicial proceedings in such cases often end once the subpoenas have been answered and the speakers have been unmasked. The true goal of the party who brought the lawsuit may have been to silence or even to harass the user (particularly if the user is revealed to be an employee of the company that was the subject of

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[3/] *See generally* Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 Duke L.J. 855, 858 n.6 (Feb. 2000) (listing numerous examples of such cases).

[4/] *See, e.g.*, Anne Colden, *Sending a Message: Companies Go to Court To Stop 'Cyber-Smearers,'* Denver Post, Jan. 15, 2001, at E1 (describing lawsuit seeking identity of John Doe poster who allegedly described company CEO as "an overweight, bald-headed, skirt-chasing underachiever"); John Eckberg, *Internet 'Free Speech' Draws Fire, Ire*, Cincinnati Enquirer, Jan. 3, 2001 (describing subpoena seeking identity of John Doe who allegedly stated that company executive "would litigate the time of day. OOOPS -- I will be in court").

[5/] *See, e.g.*, Mark Thompson, *On the Net, In the Dark*, California Law Week (Nov. 8, 1999) (available at <http://www.lawnewsnetwork.com/stories/A9068-1999Nov5.html>) (describing how a John Doe defendant forced a company called ProMedCo to withdraw its subpoena seeking the Doe's identity because the underlying complaint failed to identify any defamatory posting allegedly made by the Doe).

the posting), to mine the user for information on other users, or, more broadly, to discourage free speech on the Internet.[6/] Obviously, the courts' compulsory discovery powers do not exist to advance such goals.

AOL's own experience demonstrates that these types of John Doe lawsuits are a substantial and growing phenomenon. In the year 2000, for example, AOL received approximately 475 civil subpoenas, the vast majority of which sought identity information about an AOL subscriber. This represented an increase of almost 40 percent from 1999. Thus, on average, AOL was being asked to unmask the identity of a subscriber more than once a day in 2000. And AOL has hardly been alone. One source, for example, reports that since June 1998, one or two lawsuits seeking an online identity are filed per week in Santa Clara County, the jurisdiction in which Yahoo!'s corporate headquarters are located. *See* Blake A. Bell, *Dealing with the "Cybersmear,"* N.Y.L.J., Apr. 19, 1999, at T3.

[6/] *See* Greg Miller, "*John Doe" Suits Threaten Internet Users' Anonymity*, L.A. Times, June 14, 1999, at A1 ("[T]he growing volume of these suits — and the subsequent dropping of them in some cases after identities have been disclosed — makes some experts fear that the legal process is being abused by organizations seeking only to 'out' online foes."). In February 1999, for example, Raytheon filed a John Doe suit for alleged wrongful disclosure of confidential information by pseudonymous speakers and subpoenaed the names of 21 individuals from Yahoo!. After Yahoo! supplied the names, Raytheon dropped the suit and fired four of the Does, who turned out to be Raytheon employees. Elinor Abreu, *EPIC Blasts Yahoo for Identifying Posters*, The Industry Standard, Nov. 10, 1999. At least some of the information claimed by Raytheon to have been unlawfully posted had in fact been disclosed one month earlier in public filings made by Raytheon itself. Ross Kerber, *Raytheon Had Revealed "Secrets,"* Boston Globe, Apr. 9, 1999, at C1.

Similarly, in another case, AnswerThink filed a John Doe suit against a poster who allegedly stated that the company was "poorly managed" and described executives as "juvenile" and a "dullard." After obtaining the Doe's identity with a subpoena, AnswerThink dropped the suit and fired the poster (who was an AnswerThink employee). John Snell, *Online Anonymity on Internet Message Boards Crumbles Before Subpoenas*, The Oregonian, Oct. 30, 2000.

The proliferation of these lawsuits and subpoenas threatens to have a chilling effect on protected speech and the growth of the online medium. Although the use of legal processes to punish and deter truly tortious and harmful speech is appropriate, filing lawsuits simply as a pretext to compel the disclosure of a speaker's identity "threaten[s] not only to deter the individual who is sued from speaking out, but also to encourage undue self-censorship among the other John Does who frequent Internet discussion fora." Lyrissa B. Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 Duke L.J. 855, 861 (Feb. 2000) (hereinafter "*Silencing John Doe*"). Indeed, "[a]s more and more suits are filed, many Internet users will come to recognize the ease with which their online anonymity can be stripped simply by the filing of a libel action, and they will censor themselves accordingly." *Id.* at 889. In view of this threat, it is incumbent on courts to apply a rigorous standard to ensure that "[p]eople who have committed no wrong [can] 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 identity." *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999).

II. THE FIRST AMENDMENT PROTECTS ANONYMOUS SPEECH OVER THE INTERNET AND REQUIRES A HEIGHTENED SHOWING BEFORE ANONYMITY MAY BE BREACHED.

A. Requiring the Disclosure of an Anonymous Speaker's Identity Threatens to Infringe on the Well-Established First Amendment Right to Speak Anonymously.

The First Amendment safeguards the right of individuals to speak without revealing their identities. As the United States Supreme Court has explained, "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."

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 342 (1995); *see also 1621, Inc. v. Wilson*, 402 Pa. 94, 103, 166 A.2d 271, 275 (1961) (First Amendment "protection has been broadly extended to include . . . anonymous speech and association."). The decision to maintain 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." *McIntyre*, 514 U.S. at 340. Anonymous speech "thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation — and their ideas from suppression — at the hand of an intolerant society." *Id.* at 357. Because of the potential for retaliation and ostracism, "[t]here can be no doubt that [requiring identification of anonymous authors] would tend to restrict freedom to distribute information and thereby freedom of expression." *Talley v. State of California*, 362 U.S. 60, 64-65 (1960) (holding unconstitutional a state law prohibiting the distribution of anonymous handbills); *see also Hynes v. Mayor and Council of the Borough of Oradell*, 425 U.S. 610, 624-625 (1976) (Brennan, J., concurring).[7/]

The strong tradition of protecting anonymous communications is equally — and perhaps even more — important on the Internet and other online fora. The United States Supreme Court has unequivocally held that speech on the Internet is entitled to the highest

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[7/] The constitutional protection of anonymity extends not only to speech, but also to the closely related right of freedom of association. As the United States Supreme Court has observed, "[i]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association" as other forms of government action. *NAACP v. Alabama*, 357 U.S. 449, 462 (1958). Thus, the "Court has recognized the vital relationship between freedom to associate and privacy in one's associations. . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association . . . ." *Id.*; *see also Buckley v. Valeo*, 424 U.S. 1, 64 (1976) ("[W]e have repeatedly found that compelled

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form of First Amendment protection. *See Reno v. ACLU*, 521 U.S. 844, 870 (1997). As the Supreme Court aptly recognized, through the Internet and interactive services such as AOL, "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, mail exploders, and newsgroups, the same individual can become a pamphleteer." *Id.*

The extensive use of screen names and other online pseudonyms is critical to the development of the Internet as a vehicle for individual expression. Users may wish to speak anonymously online for a variety of reasons: to criticize the activities of public officials or corporations without fear of retaliation, to "blow the whistle" on an employer who is engaging in unlawful or otherwise improper activity, to voice unpopular opinions on topical issues, to avoid harassment or even stalking by other online users, or to obtain advice or counseling on difficult problems or medical conditions. *See, e.g.*, *ACLU v. Reno*, 929 F. Supp. 824, 849 (E.D. Pa. 1996) ("Anonymity is important to Internet users who seek to access sensitive information . . . ."), *aff'd*, 521 U.S. 844 (1997). As one commentator has explained, anonymity not only allows speakers to experiment with unconventional or unpopular ideas without fear of ridicule or retaliation, but also "promises to make public debate in cyberspace less hierarchical and discriminatory than real world debate to the extent that it disguises status indicators such as race, class, gender, ethnicity and age which allow elite speakers to dominate real-world discourse." *Silencing John Doe*, 49 Duke L.J. at 896.

Accordingly, as many courts have recognized, the First Amendment protects the freedom to speak anonymously over the Internet just as it does anywhere else. *See, e.g.*,

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disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by
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ACLU v. Johnson, 4 F. Supp.2d 1029, 1033 (D.N.M. 1998) (recognizing a First Amendment right to "communicat[e] and access[] information anonymously" on the Internet), *aff'd*, 194 F.3d 1149 (10th Cir. 1999); *ACLU v. Miller*, 977 F. Supp. 1228, 1233 (N.D. Ga. 1997) (striking down as unconstitutional a state statute that, *inter alia*, prohibited "such protected [online] speech as the use of false identification to avoid social ostracism, to prevent discrimination and harassment, and to protect privacy"); *In re Subpoena Duces Tecum to America Online, Inc.*, Misc. Law No. 40570, 2000 WL 1210372 at *6 (Va. Cir. Ct. 2000) ("To fail to recognize that the First Amendment right to speak anonymously should be extended to communications on the Internet would require this Court to ignore either United States Supreme Court precedent or the realities of speech in the twenty-first century.") (Attachment B); *Dendrite Int'l v. John Does*, No. MRS C-129-00, at 18-19 (N.J. Sup. Ct. Nov. 23, 2000) ("Inherent in First Amendment protections is the right to speak anonymously in diverse contexts," including online.) (Attachment C).

B. Because of the First Amendment Interests at Stake, a Party Asking a Court to Compel Disclosure of the Identity of an Anonymous Speaker Must Satisfy a Heightened Standard of Scrutiny.

Courts have made clear that where compelled disclosure — whether in the context of civil discovery or other instances in which the government seeks to compel the release of information — would infringe First Amendment rights, the party seeking the disclosure must meet a heightened standard of scrutiny. Courts "long have recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest." *Buckley*,

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the First Amendment.").

424 U.S. at 64. Instead, the state may require disclosure of identity information only if the disclosure is "narrowly tailored to serve an overriding state interest." *McIntyre*, 514 U.S. at 347; *see also Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960) (First Amendment permits compelled disclosure of private membership list "only upon showing a subordinating interest which is compelling"); *NAACP v. Alabama*, 357 U.S. 449, 462-63 (1958) (same); *New Jersey Citizen Action v. Edison Township*, 797 F.2d 1250, 1265 (3d Cir. 1986).

This same heightened standard applies where, as here, a party asks a court to compel discovery of otherwise confidential identity information in the context of an ongoing legal proceeding. In this realm, "as in all others, such disclosure of confidential associational affiliations and activities must be justified by a compelling state interest and must be precisely tailored to avoid undue infringement of constitutional rights." *Britt v. Superior Court of San Diego County*, 574 P.2d 766, 779 (Cal. 1978) (en banc). Thus, "in supervising discovery . . . [a] court has a duty to consider First Amendment interests as well as the private interests of the plaintiff." *Herbert v. Lando*, 441 U.S. 153, 178 (1979) (Powell, J., concurring). "Indeed, in some respects, the threat to First Amendment rights may be more severe in a discovery context, since the party directing the inquiry is a litigation adversary who may well attempt to harass his opponent and gain strategic advantage by probing deeply into areas which an individual may prefer to keep confidential." *Britt*, 574 P.2d at 774; *see also Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35 (1984) ("There is an opportunity . . . for litigants to obtain — incidentally or purposefully — information that not only is irrelevant but if publicly released could be damaging to reputation and privacy. The government clearly has a substantial interest in preventing this sort of abuse of its processes.").

III. COURTS SHOULD PROTECT ANONYMOUS ONLINE SPEAKERS' FIRST AMENDMENT RIGHTS BY REQUIRING PLAINTIFFS TO DEMONSTRATE THAT THEY HAVE VIABLE CLAIMS BEFORE COMPELLING DISCLOSURE OF IDENTITY INFORMATION.

As the court below and a number of other courts have recognized, because the compelled disclosure of an anonymous speaker's identity threatens to infringe the speaker's First Amendment rights, courts should assure themselves that the claims asserted against such a speaker have merit — and are not merely a pretext for obtaining discovery — *before* permitting plaintiffs to employ judicial processes to breach the veil of anonymity. At a minimum, this threshold screening must require the plaintiff to demonstrate that the claims would survive a motion to dismiss, are supported by evidence, and cannot be pursued without breaching anonymity. Moreover, at least where, as here, the Doe defendants are represented in the litigation, a court should permit the defendants to litigate as much of the merits as possible through the summary judgment stage before permitting discovery aimed at unmasking the defendants' identities.[8/] Engaging in this process — and not simply permitting plaintiffs to file a suit and thereby compel disclosure of identity information without demonstrating that their claims are viable — appropriately balances the legitimate interest in

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[8/] AOL recognizes that the John Doe defendants asked the court below to bifurcate the case to allow certain issues to be litigated all the way *through trial* before permitting Melvin to take discovery relating to defendants' identities, and that the court below denied that request. *See* Trial Ct. Op. at 3-4. AOL endorses the proposition that, in general, John Doe litigants in cases such as this one should be afforded the opportunity to litigate as fully as possible all issues that do not turn on their identities before such discovery is allowed. AOL does not take a position on whether, in this particular case, the court below could have done even more than it did to permit the defendants to contest the merits of Melvin's claims before permitting discovery into their identities.

unmasking actual wrongdoers with the First Amendment rights of citizens to speak anonymously.[9/]

The court below rightly recognized that there is no legitimate reason — much less a compelling interest — that justifies the unmasking of an anonymous online speaker's identity if, notwithstanding the filing of a suit, no tort (or other illegal act) has been committed. *See* Trial Ct. Op. at 2 n.2 ("A plaintiff should not be able to use the rules of discovery to obtain the identity of an anonymous publisher simply by filing a complaint that may, on its face, be without merit."). Several courts have applied this principle to test the merits of a claim before compelling the identification of anonymous online speakers. For example, in *In re Subpoena Duces Tecum to America Online, Inc.*, a plaintiff caused a subpoena to issue to AOL in an effort to learn the identity of an online speaker. In adjudicating a motion made by AOL to quash the subpoena, the Virginia court held that "before a court abridges the First Amendment right of a person to communicate anonymously on the Internet, a showing, sufficient to enable that court to determine that a true, rather than perceived, cause of action may exist, must be made." 2000 WL 1210372 at *7. The court further explained that, before ordering disclosure of a speaker's identity, a court must be "satisfied by the pleadings or evidence supplied to that court . . . that the party requesting the subpoena has a legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where suit was filed and . . . the subpoenaed identity information is centrally needed to advance that claim." *Id.* at *8.

[9/] In some cases — such as where a Doe defendant has yet to appear and a valid subpoena has issued requiring the disclosure of the defendant's identity — litigation through the summary judgment stage may not always be feasible, although even there some screening of the evidence by the court often will be appropriate. Indeed, in circumstances where no one is present to represent the Doe defendants and discovery is being sought on an entirely *ex*

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Similarly, in *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999), the court explained that the need to provide a forum for injured parties "must be balanced against the legitimate and valuable right to participate in online forums anonymously or pseudonymously . . . ." *Id.* at 578. Accordingly, the court required that the plaintiff demonstrate that it had a prima facie case before the court would authorize the plaintiff to seek discovery aimed at identifying a pseudonymous defendant, who had purportedly infringed the plaintiff's trademarks by registering an Internet domain name virtually identical to the trademark. Significantly, the court evaluated whether the plaintiff had met this test not by simply accepting its allegations, but by independently evaluating the evidence. *See id.* at 579. The court reasoned that this screening mechanism was necessary as "a protection against the misuse of *ex parte* procedures to invade the privacy of one who has done no wrong. . . . [It] is necessary here to prevent abuse of this extraordinary application of the discovery process and to ensure that plaintiff has standing to pursue an action against defendant." *Id.* at 579-80.

Most recently, the New Jersey Superior Court denied a plaintiff's request for authorization to conduct out-of-state discovery to learn the identity of two John Doe defendants whose anonymous online postings were alleged to be defamatory and to violate confidentiality provisions in employment agreements. *Dendrite Int'l v. John Does*, No. MRS C-129-00 (N.J. Super. Ct. Ch. Div. Nov. 23, 2000) (Attachment C). After examining the posted statements and the evidence presented, the court, applying the *Seescandy* test, held that the plaintiffs had "failed to provide this Court with ample proof from which to conclude that

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parte basis, meaningful judicial scrutiny before discovery is permitted may serve as the only
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[the two John Doe defendants] have used their constitutional protections in order to conduct themselves in a manner which is unlawful or that would warrant this Court to revoke their constitutional protections." *Id.* at 22.

The principles adopted by these cases involving anonymous online speech are consistent with and build on prior case law establishing similar threshold tests before permitting governmental power to be used to unmask the identity of an anonymous speaker. One case exemplifying this point is *National Labor Relations Bd. v. Midland Daily News*, 151 F.3d 472 (6th Cir. 1998), in which the NLRB subpoenaed a newspaper publisher to identify the party who had placed an anonymous classified ad seeking electricians. The Sixth Circuit affirmed the district court's denial of the NLRB's motion to compel enforcement on the grounds that the subpoena would violate the First Amendment rights of both the newspaper and the advertiser. *Id.* at 473. The Court of Appeals held that, because the NLRB had sought a subpoena before it had developed "any factual support for its action, and before it had developed or implemented a less intrusive means to conduct its investigation," the NLRB had "facially failed to demonstrate a substantial state interest which outweighs the danger to the free speech rights of [the newspaper], its anonymous advertiser, and the countless similarly situated entities across the nation." *Id.* As the court further explained, "permitt[ing] the Board to obtain the identity of [the newspaper's] advertiser, without demonstrating a reasonable basis for seeking such information, [would create a] chilling effect on the ability of every newspaper and periodical to publish lawful advertisements [that] would clearly violate the Constitution." *Id.* Likewise, in *Rancho Publications v. Superior Court*, 81 Cal. Rptr. 2d

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available safeguard against abuse of judicial process.

274, 279-82 (Ct. App. 1999), a court declined to permit discovery of the identity of anonymous advertisers because the plaintiff had failed to show "compelling need" for the information.

Similarly, in cases involving the reporter's qualified First Amendment privilege not to reveal anonymous sources,[10/] some courts have required that the party seeking disclosure demonstrate that its claim "is not frivolous [or] a pretense for using discovery powers in a fishing expedition. In this case, plaintiff should show that it can establish jury issues on the essential elements of its case not the subject of the contested discovery." *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 597 (1st Cir. 1980); *see also Cervantes v. Time, Inc.*, 464 F.2d 986, 994 (8th Cir. 1972); *Southwell v. Southern Poverty Law Center*, 949 F. Supp. 1303, 1310-11 (W.D. Mich. 1996) ("[O]rdering disclosure of anonymous news sources without first inquiring into the substance of a libel allegation would utterly emasculate the fundamental principles that underlay the line of cases articulating the constitutional restrictions to be engrafted upon the enforcement of state libel laws.").

All of these cases demonstrate that a plaintiff cannot overcome the First Amendment interests in anonymity without first showing that he or she has viable claims. Before permitting discovery of an anonymous speaker's identity, a court at a minimum must be satisfied that the plaintiff has stated a prima facie case. The court should not simply rest on

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[10/] *See generally Branzburg v. Hayes*, 408 U.S. 665, 709-10 (1975) (Powell, J., concurring). Under both federal and Pennsylvania law, a journalist may not be required to reveal the identity of an anonymous or confidential source unless (1) the information is relevant and necessary, (2) the information cannot be obtained by alternative means, and (3) the information is crucial to the plaintiff's case. *See, e.g., Riley v. Chester*, 612 F.2d 708, 716-17 (3d Cir. 1979); *Davis v. Glanton*, 705 A.2d 879, 885 (Pa. Super. 1997). The trial court found that these requirements were satisfied in the present case. *See* Trial Ct. Op. at 21-28.

the conclusory allegations of the complaint, but instead should independently evaluate the viability of plaintiff's claims. In cases such as this one, where the Doe defendants have appeared, courts should test that viability by permitting litigation of as much of the merits as possible without disclosure of the defendants' identities so that the defendants may first have the opportunity to demonstrate that the plaintiff could not prevail as a matter of law. In that way, courts will protect the First Amendment right of anonymity and prevent abuse of legal processes, while still allowing plaintiffs to obtain appropriate redress in cases of actual actionable wrongdoing.

In the present case, the trial court recognized the important First Amendment interests at stake and appropriately determined that "plaintiff should not be permitted to engage in discovery to learn the identity of the Doe defendants until the Doe defendants [have] had an opportunity to establish that, as a matter of law, plaintiff could not prevail in this lawsuit." *See* Trial Ct. Op. at 2. The trial court accordingly permitted the Doe defendants to litigate some merits issues through the summary judgment stage before permitting discovery concerning the Doe defendants' identities. AOL urges this Court to recognize that the trial court's decision to proceed in this manner was a necessary and appropriate means for protecting the First Amendment rights of online speakers.

CONCLUSION

For the foregoing reasons, AOL asks this Court to approve and endorse the lower court's ruling that, in view of the First Amendment interests at stake, a plaintiff such as Melvin should not be able to engage in discovery to learn the identity of anonymous online speakers until the plaintiff has demonstrated that she has viable claims and the defendants have had a full opportunity to show that plaintiff could not prevail as a matter of law.

Respectfully submitted,

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