IN THE APPELLATE COURT OF ILLINOIS FIRST DISTRICT
Case No. 09-3386

LISA STONE, as mother and next friend of Jed Stone, Plaintiff-Appellee, v. JOHN DOE, Defendant-Appellant.	Appeal from the Circuit Court of Cook County, Law Division Circuit Case No: 09 L 5636 Trial Judge: Hon. Jeffery Lawrence Date of Notice of Appeal: December 7, 2009 Date of Final Order: November 18, 2009

AMICI CURIAE BRIEF OF THE ELECTRONIC FRONTIER FOUNDATION & THE MEDIA FREEDOM AND INFORMATION ACCESS PRACTICUM IN SUPPORT OF APPELLANT

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I. INTRODUCTION

Amici urge this Court to properly apply the protections mandated by the First Amendment and protect the identity of the anonymous online speaker targeted in this case. Appellee Stone seeks the identity of a pseudonymous speaker on an Internet message board, claiming that this speaker defamed her son. The trial court erred in ordering the disclosure of Appellant John Doe's identity without appropriately applying the heightened discovery standard recognized by courts across the country as necessary to protect First Amendment rights. The trial court's protective order barring disclosure of the identity information to anyone other than the Appellee herself—the individual improperly seeking to use Rule 224 to out her critic—does not adequately protect Doe's First Amendment rights or reassure other anonymous speakers who will likely be chilled as a result.

Because Illinois courts have yet to articulate a consistent approach to evaluate discovery requests seeking the identity of online critics, this case is of particular consequence. Anonymous speech is a cherished right in American jurisprudence. The right of John Doe in this case and of all John Does relies upon a correct and consistent application of First Amendment interests. Without such consistency and without assurances that anonymous speech will be properly protected, online speakers will be chilled not only through the improper use of discovery vehicles such as Rule 224 but also due to the fear of being exposed by the targets of their criticism.

II. SUMMARY OF ARGUMENT

The First Amendment protects an individual's right to speak his or her mind behind the shield of anonymity. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). Anonymity provides essential protection for the less powerful to articulate thoughts or criticism in the face of potential retribution from the wealthier or more politically powerful subjects of their remarks. Anonymity allows for activities such as whistle-blowing but cannot be limited to socially useful speech alone for its impact to be

felt. *N.A.A.C.P. v. Button*, 371 U.S. 415, 445 (1963) (explaining that the constitutional protection afforded by the First Amendment does not turn upon "the truth, popularity, or social utility of the ideas and beliefs which are offered."). The First Amendment right to anonymity, like other First Amendment protections, affords a penumbra of protection which includes valuable discourse that otherwise would not occur.

The rationale behind the First Amendment's protection of anonymity applies even more strongly in the online context. The Internet provides a platform that allows for "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). The Internet allows individuals who would not have access to a means of traditional print publication to voice their concerns publicly. However, as the Internet consists of a series of platforms provided by intermediaries, those who facilitate the "publication" of anonymous speech—be they websites, newspaper comments sections, blogs, or Internet Service Providers (ISPs)—have lesser incentives to protect the anonymity of the speakers who publish on their platforms than do the speakers themselves. These intermediaries generally have no real reason, apart from good conscience, not to turn over identifying information about individuals who use their services. Courts must be particularly vigilant, therefore, in protecting anonymous speech online, because no other parties involved necessarily have reason to provide the protection anonymous speakers deserve.

In this case, the use of Illinois Supreme Court Rule 224 to provide pre-complaint discovery of a critical speaker's identity is particularly problematic. Pre-complaint discovery procedures grant plaintiffs the ability to invoke the authority of the court to pry into the personal lives of individuals whose only articulated offense is speaking, without themselves having to go through the "trouble" of filing suit and backing up their allegations (or subjecting themselves to penalties for filing frivolous or retaliatory lawsuits). Rule 224 was not contemplated as a tool for criticized individuals to uncover the identity of speakers whose words have offended them. It was instead contemplated as

the solution to a narrow legal problem that arose in industrial accident cases in Illinois, a scenario not at issue here.[1]

The use of Rule 224 to out anonymous speakers in cases in which they are accused of making offensive comments—where obtaining the identity of their critics is likely the sole or primary aim of the party threatening suit—is problematic at best. Regardless of whether Rule 224 is even appropriately applicable in such a case given the serious First Amendment questions, however, the Court must still adhere to the heightened discovery standards mandated by the First Amendment. Accordingly, the Court follow the approach must saliently set forth in *Dendrite Int'l v. Doe No. 3*, 775 A.2d 756 (N.J. App. 2001), and followed by courts around the country,[2] requiring plaintiffs to:

(1) make reasonable efforts to notify the accused Internet user of the pendency of the identification proceeding and explain how to present a defense;
(2) set forth the exact statements the litigant alleges constitute actionable speech;
(3) allege all elements of the cause of action and introduce prima facie evidence within the litigant's control sufficient to survive a motion for summary judgment; and,
(4) "[f]inally, assuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed."

Dendrite, 775 A.2d at 760–61.

The Appellee cannot make this showing in this case because, among other reasons (as explained in detail by Appellant in his brief), the statements made by the Appellant

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[1] *See* Committee Comments (hereinafter "Committee Comments"), *available at* http://www.state.il.us/ court/supremecourt/rules /Art_II/ArtII.htm#224.

[2] *See, e.g., Independent Newspapers, Inc. v. Brodie*, 966 A.2d 432, 457 (Md. 2009); *Mobilisa, Inc. v. John Doe 1*, 170 P.3d 712, 717–721 (Ariz. App. 2007); *Greenbaum v. Google, Inc.*, 845 N.Y.S.2d 695, 698–99 (N.Y. Sup. Ct. 2007); *Cahill*, 884 A.2d 451, 459–60 (Del. 2005) (applying a modified *Dendrite* test).

are not defamatory and therefore not actionable. Given the extraordinary invasiveness of a discovery order (pre-complaint, no less) ordering the unmasking of a speaker in the absence of a need to pursue a valid claim, Appellee's discovery request should be denied. The impact of this Court's decision will reach far behind the confines of this case, however, and inform whether and how potential litigants will attempt to utilize the discovery process in order to respond to critical online speech. *Amici* strongly urge the Court to adopt the prevailing First Amendment standard and require civil litigants to meet a summary judgment standard—establish a prima facie claim and support each element of that claim with competent evidence—before being granted permission to unmask their critics.

III. ARGUMENT

A. The First Amendment Protects the Right to Engage in Anonymous Speech.

Under the broad protections of the First Amendment, speakers have the right to publicly express criticism and to do so anonymously. The Supreme Court has repeatedly affirmed the notion that the First Amendment protects the right to speak anonymously, explaining that "[a]nonymity is a shield from the tyranny of the majority . . . [that] exemplifies the purpose [of the First Amendment] to protect unpopular individuals from retaliation . . . at the hand of an intolerant society." *McIntyre*, 514 U.S. at 357 (citation omitted). *See also, e.g., id.* at 342 ("[A]n 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."); *Talley v. California*, 362 U.S. 60, 64 (1960) ("Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind.").

1. First Amendment Protections Are Heightened When the Speech at Issue Is Political Speech.

The First Amendment is not limited in application to socially useful speech. However, one of its core purposes is to assure the "unfettered interchange of ideas for the

bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). The "general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions." *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1963). In fact, that proposition "is a fundamental principle of our constitutional system." *Stromberg v. California*, 283 U.S. 359, 369 (1931).

Discussion of public questions may, in the heat of argument, bring with it speech that appears less desirable. *Bridges v. California*, 314 U.S. 252, 270 (1941) (stating that "it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions."). However, such undesirable speech must be examined against the "background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks." *New York Times Co.*, 376 U.S. at 270.

In upholding the right to speak anonymously, the Supreme Court has noted this country's long tradition of anonymous speech as part of the public discourse. In *McIntyre*, the Court explained that anonymity "exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular . . . ideas." *McIntyre,* 514 U.S. at 357. Anonymous speech is of particular value in the political context: it allows political discussion in small communities where the speaker may fear social or even physical repercussions for criticizing a person in power.

While Appellee's discovery request would fail to clear the First Amendment bar in any event as the statements at issue are not defamatory, this case requires evaluation against the backdrop of strong First Amendment protection for political speech. John Doe posted his comments in the "reader comments" section of a local newspaper's website associated with an article concerning campaign tactics in a local village board race. James Kane, *Does campaign filer misrepresent Buffalo Grove endorsement?*, Daily

Herald (April 6, 2009), *available at* www.dailyherald.com/story/?id=284378. Doe began by criticizing the article's focus on candidate Joanne Johnson, wondering why the newspaper had not reported candidate Lisa Stone's allegedly poor behavior during the campaign. Doe then went on in further comments to criticize Stone directly. He engaged in a back-and-forth with other anonymous commentors regarding Stone and her campaign. In the course of this back-and-forth on what was unquestionably a political topic, John Doe apparently insulted an opposing commentor who revealed himself to be Stone's son.

The present case represents a classic example of why the First Amendment protects anonymity: Doe's identity should not be revealed to the political candidate whose campaign and person he publicly criticized because that person is now in a position of political and presumably social power. This Court's evaluation of what protection Doe should be afforded must be made against the background of a history of strong protection for precisely this sort of speech, against precisely this sort of prospective plaintiff.

2. First Amendment Concerns Are Heightened When Challenged Speech Takes Place on a Newspaper Website.

In addition to weighing the type of speech at issue, this Court should consider the forum in which the speech occurred. Doe made his comments on a newspaper website. Revealing Doe's identity could have a chilling effect resulting in both social and economic consequences for the newspaper and the community that surrounds it.

The chilling effect of revealing the identity of newssite commentors is not a specious speculation. In August, China issued a secret directive requiring news portals to collect the real names and identification numbers of readers seeking to comment on news stories. Jonathan Ansfield, *China Web Sites Seeking User's Names*, The New York Times at A4 (Sept. 6, 2009), *available at* http://www.nytimes.com/2009/09/06 /world/asia/06chinanet.html. Editors at top news portals "said their sites had shown

marked drop-offs" in reader participation as a result. *Id.* As other courts have recognized, the chilling effect induced by revealing Doe's identity would "compromise the vitality of the newspaper's online forums, sparking reduced reader interest and a corresponding decline in advertising revenues." *Enterline v. Pocono Med. Ctr.*, No. 3:08-cv-1934, 2008 WL 5192386, at *3 (M.D. Pa. Dec. 11, 2008).

The public interest in fostering discussion around a free press must also be considered. Newspaper websites should be recognized as a forum that is particularly conducive to political speech. The commentors on a newspaper website often write in reply to the substance of news articles. Their contributions, usually anonymized, frequently reflect public desire for change and often add to news stories and provide "social value as a step to truth." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

Because of the strength of First Amendment protection for the press and for the right to receive ideas, newssites are (and should be) viewed by commentors as a safe haven for the absorption and expression of political views. Newspapers are afforded heightened First Amendment protection; there is no fair warning to newssite commentors that their writings will be treated any differently. Furthermore, revealing the identity of commentors points not just to the comments they've made but also to which articles they have been reading, implicating the First Amendment right to receive ideas anonymously. *See, e.g.*, *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas."); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) ("The right of freedom of speech and press includes not only the right to utter or to print, but . . . the right to receive, the right to read . . . and freedom of inquiry . . . ." (citations omitted)); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) ("The right of freedom of speech and press has broad scope. This freedom embraces the right to distribute literature . . . and necessarily protects the right to receive it." (citations omitted)).

Finally, the newssite forum returns us to one of the core values for protecting anonymous speech: the whistle-blower function. Newspapers are increasingly turning to their online readership for actual reporting, or the provision of tips or leads. *See Citizen Journalism Publishing Standards*, The Huffington Post, Apr. 14, 2009, *available at* http://www.huffingtonpost.com/2009/04/07/citizen-journalism-publis_n_184075.html. Not all reader participation provides substantive or reliable leads, but collaboration between newspapers and their readers is increasingly vital to newsgathering. *See* Leonard Downie, Jr. & Michael Schudson, Columbia University Graduate School of Journalism, The Reconstruction of American Journalism (2009) (discussing the unprecedented importance of professional-amateur collaborations enabled by online platforms). Allowing the identities of commentators to be revealed in the absence of heightened process may well have negative collateral impacts such as chilling the potential for whistle-blowing on newssites.

3. The First Amendment Right to Speak Anonymously Applies Fully to the Internet.

The anonymity guaranteed by the First Amendment fully extends to comments made online. *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (stating that there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to" the Internet); *see also, e.g.*, *Sinclair v. TubeSockTed*D, 596 F.Supp. 2d 128 (D.D.C. 2009); *Doe v. Cahill*, 884 A.2d 451, 456 (Del. 2005); *Doe v. 2theMart.com*, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001) (confirming that "[t]he right to speak anonymously extends to speech via the Internet").

Indeed, the rationale for protecting anonymous speech applies equally—if not more forcefully—to protecting speech on the Internet, as the Internet has become the primary medium for "facilitat[ing] the rich, diverse, and far ranging exchange of ideas." *2theMart*.com, 140 F. Supp. 2d at 1092. Because of the low costs associated with creating and distributing content online, the Internet has opened up the channels of

publication to ordinary individuals with limited financial resources, creating an explosion of different viewpoints on topics "as diverse as human thought." *Reno*, 521 U.S. at 852. This proliferation of voices has created a vibrant new marketplace of ideas and unparalleled opportunities of uninhibited, robust, and wide-open public discourse. *See Reno*, 521 U.S. at 870 ("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 . . . and newsgroups, the same individual can become a pamphleteer."); Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 Duke L.J. 855, 860–61, 897 (2000) (noting the Internet's potential to "giv[e] voice to the disenfranchised and . . . allow[] more democratic participation in public discourse" and to "mak[e] public discourse richer and more nuanced").

Anonymous speech enables individuals to contribute to this vibrant online discourse without fear of retaliation or embarrassment, making it more likely for marginal voices to contribute and facilitating richer and more diverse points of view. As one court put it, the ability to speak anonymously and pseudonymously on the Internet "offers a safe outlet for the user to experiment with novel ideas, express unorthodox political views, or criticize corporate or individual behavior without fear of intimidation or reprisal." *Krinsky v. Doe*, 72 Cal. Rptr. 3d 231, 237 (Cal. App. 4th 2008).

4. The Structure of the Internet Raises Particular Concerns for the Protection of Anonymous Speakers.

The structure of the Internet provides little protection for anonymous speakers. When a plaintiff decides to go after an anonymous critic who has vocalized dissent online, the usual recourse is to approach the website, or Online Service Provider (OSP), followed by the Internet Service Provider (ISP). Nathaniel Gleicher, *John Doe Subpoenas: Toward a Consistent Legal Standard*, 118 Yale L.J. 320, 328 (2008). The website often, but not always, has the commentor's IP address—a series of numbers that identifies the computer, but not the person, that posted the comment. To connect the IP

address to further identifying information such as the name on the account or the telephone and address associated with the computer, the plaintiff must then approach the ISP that distributed that IP address and provided Internet service to the commentor.

Both website and ISP obviously have less of an interest in defending the commentor's anonymity than the commentor himself.[3] Because of this split in interest, service providers may be quite likely to hand over the information to the plaintiff without contacting the commentor to warn him or her. The imbalance of power continues into legal proceedings: the commentor, due to the low-cost of participation of online speech, is less likely than traditional print media to be able to afford counsel that could provide him with an adequate First Amendment defense. For these reasons (among others), courts have required that the plaintiff make reasonable efforts to notify the John Doe, inform him of the pending proceeding, and explain how to present a defense.

5. Illinois Law Further Protects the Right to Anonymous Speech.

a. The Illinois Constitution Protects Anonymous Speech.

The Illinois Supreme Court has recognized that the right to anonymous speech, as guaranteed by the First Amendment, additionally emanates from Article I, section 4, of the Illinois Constitution. While Illinois courts analyze free speech claims under the federal and state constitutions together, they also "keep[] in mind that protection of these liberties under the Illinois Constitution is *broader* than under the United States Constitution." *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F. Supp. 2d 961, 979 n.12 (N.D. Ill 2003) (emphasis added) (citing *City of Blue Island v.*

[3] This imbalance of the interests of intermediaries and individual users of a website or ISP has been recognized by Congress in the context of copyright law, which provides remedy for the individual whose non-infringing work has been inappropriately taken down by a web platform. 17 U.S.C. 512(f). This section requires websites to consider the interests of the individual content-poster, instead of bowing at first glance to takedown notices that lack legal validity.

Kozul, 379 Ill. 511, 520 (Ill. 1942) (ordinance requiring that minister obtain a license before distributing literature was impermissible restriction on free speech)).

In *People v. White,* 116 Ill. 2d 171, 176 (Ill. 1987), the Illinois Supreme Court held that an election code that required distributors of political literature to identify themselves was unconstitutional under both the First Amendment and Article I, section 4 of the 1970 Illinois Constitution, because "such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression." *Id.* at 176 (citing *Talley,* 362 U.S. at 64). In *White,* the Court recognized the importance of anonymity to preserving the right to freely speak, write, and distribute writings, noting that "[a]nonymous political literature was a key weapon in the arsenal of colonial patriots." *White* at 176.

The *White* court also recognized the danger that government-compelled disclosure of identity could be used for the "unconstitutional intimidation" of free expression, particularly with regards to "[p]ersons harboring dissenting or unpopular political views, or even those merely advocating a quixotic . . . campaign." *Id.* at 177. As the court recognized, compulsory identification exposes speakers to "economic reprisal, loss of employment, or other manifestations of public hostility." *Id.* (citing *NAACP v. Alabama,* 357 U.S. 449, 462 (1958)) (quotation marks omitted). Allowing for the plaintiff in a libel action to obtain the identity of an anonymous critic by subpoena would turn the courts into a potential vehicle for such intimidation.

b. Illinois Legislation Has Recognized the Importance of Anonymous Speech.

Additionally, the Illinois legislature has recognized the importance of anonymous speech in a different context, in its protection of reporters' anonymous sources. 735 Ill. Comp. Stat. 5/8-901 to 8-909. Illinois law is sensitive to the speech-stifling effects of disclosure of identity where a party seeks to obtain the identity of a reporter's source through subpoena. For this reason, it demands that a number of requirements, which

mirror the *Dendrite* requirements, be satisfied before a reporter can be compelled to disclose the identity of her source. These requirements include: (1) probable cause to believe that the identity of the sources is "clearly relevant to a specific probable violation of law," (2) a prima facie showing of falsity of the alleged defamation and actual damages, and (3) a balancing test between "the plaintiff's need for disclosure of the information sought" and "the public interest in protecting the confidentiality of sources of information used by a reporter." 735 Ill. Comp. Stat. 5/8-907; *In re Subpoena Duces Tecum*, 226 Ill. App. 3d 848, 860–61 (Ill. App. 1992) (applying Ill. Rev. Stat. 1989, ch. 110, par. 8-901 and Justice Stewart's proposal for a "qualified" reporter's privilege (citing *Branzburg v. Hayes*, 408 U.S. 665, 743 (1972) (Stewart, J., dissenting))).

While *amici* do not assert that in this particular case, Doe should be considered a reporter's "source," the First Amendment principles that animate the Illinois General Assembly's solicitude of the reporter's privilege are relevant to the protection of anonymous speech in online news forums and suggest that the *Dendrite* standard is appropriate given the Assembly's historical recognition of privacy rights in the context of First Amendment expression.

B. Illinois Amended Supreme Court Rule 224 Should Not Be Applied in Cases Concerning Anonymous Speech.

The scope of Illinois Amended Supreme Court Rule 224, the discovery method employed by the Appellee, is inappropriate in cases implicating First Amendment rights. As pre-complaint discovery, Rule 224 allows plaintiffs to harness the power of the courts without committing to any actual allegations or concurrently subjecting themselves to potential court sanctions for misusing the streamlined process to inappropriately pursuing critics. The Rule was originally envisioned as a tool to help plaintiffs navigate procedural hurdles endemic to industrial accident cases in which, under Illinois law, employers had little incentive to cooperate with (for a example) a worker's widow. *Skinner v. Reed-Prentice Division Package Machinery Co.*, 70 Ill. 2d 1, 15 (Ill. 1977).

Rule 224 was not intended to apply to cases implicating rights protected under the First Amendment. Therefore, if applied at all in this context, it should be applied with great care, using the structured balancing test laid out in cases such as *Dendrite*.

1. Rule 224 Was Not Intended for Discovery Implicating Anonymous Speech.

Rule 224 was adopted to solve a specific procedural problem in Illinois law and was not intended to address matters of anonymous expression. The Committee Comments regarding its adoption explain that Rule 224:

> "provides a mechanism for plaintiffs to ascertain the identity of potential defendants in a variety of civil cases, including *Structural Work Act, products liability, malpractice and negligence claims*. The rule will be of particular benefit in *industrial accident cases* where the parties responsible may be known to the plaintiff's employer, which may immunize itself from suit."

Committee Comments, *supra* note 1.

Rule 224 was envisioned to solve a procedural difficulty in industrial accident cases, created by *Skinner*, 70 Ill. 2d at 1. *Skinner* removed protection of employers in industrial accident cases, so that a widow attempting to discover information about an accident would no longer have the cooperation of the employer in structuring her claim. *Roth v. Saint Elizabeth's Hospital*, 241 Ill. App. 3d 407, 418 (Ill. App. Ct. 1993). The complicated discovery procedure used in the aftermath of *Skinner* was "one of the reasons for the promulgation of Rule 224." *Id.*

2. Because of Its Potential for Abuse, Courts Have Repeatedly Held That the Reach of Rule 224 Is Limited.

Illinois courts have recognized that Rule 224, whenever applied, is limited in scope. Application of Rule 224 is limited to discovery of the unknown identity of "one who may be responsible in damages," and does not permit fishing expeditions aimed at discovering potential responsibility. *Gaynor v. Burlington Northern and Santa Fe Ry.*, 322 Ill. App. 3d 288, 290 (Ill. App. Ct. 2001) (citing *Guertin v. Guertin*, 204 Ill. App. 3d 527 (Ill. App. Ct. 1990)). Courts have further noted that it is "abundantly clear that 'one

who may be responsible' means a 'potential defendant.'" *Gaynor*, 204 Ill. App. 3d at 291–92 (citing *Roth*, 241 Ill. App. 3d at 414–15). This language implies that a valid cause of action should exist prior to the application of Rule 224, even in cases that do not implicate constitutional rights.

Illinois Courts have, even independently of a First Amendment claim, recognized the particular due process dangers inherent in Rule 224:

> Where in our American system of justice can a citizen be hauled into court without any suit or accusation being filed against the citizen and be made to answer questions or else go to jail other than under Rule 224? Shouldn't we limit this encroachment on the freedom of an individual to very limited situations where the public interest outweighs our citizens' right to privacy and their freedom not to speak?
>
> . . . Surely our system of law has not declined to a state where we order citizens to prove their innocence to an attorney at law!

Roth, 241 Ill. App. 3d at 421-22 (J. Lewis, concurring). In the present case, where constitutional rights are implicated, it is particularly important that the Court not "order" Doe to "prove [his] innocence" before a prima facie complaint has been stated.

3. Rule 224 Must Defer to Other Rights and Rules of Law.

In any event, the procedural shortcut provided by Rule 224 cannot trump other legally cognizable rights and privileges. As noted in the legislative history, the Rule is "not intended to modify in any way any other rights secured or responsibilities imposed by law." Committee Comments, *supra* note 1.

This applies to rights that are constitutionally protected and even rights created by the legislature. *See, e.g.*, *Cukier v. American Medical Ass'n*, 259 Ill. App. 3d 159 (Ill. App. 1994) (applying Illinois Reporter's Privilege law to the exclusion of Rule 224). Here, the heightened discovery protections imposed by the First Amendment must be applied in order to protect the rights of the speaker.

C. The Correct Legal Standard for Unmasking Anonymous Speakers.

The qualified privilege of anonymity protected by the First Amendment requires that this Court apply a structured balancing test, such as the one laid out in *Dendrite*.

1. Anonymous Speakers Enjoy a Qualified Privilege Under the First Amendment.

The First Amendment requires those who seek to unmask vocal critics to demonstrate a compelling need for such identity-related information. The protection of anonymous speakers in the discovery process has been recognized as a "[q]ualified [p]rivilege," subjecting the efforts to use the power of the courts to appropriate constitutional limitations.[4] Lyrissa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 Notre Dame L. Rev. 1537, 1599 (2007).

Courts must consider this privilege before authorizing discovery. *See, e.g., Sony Music Entm't Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 565 (S.D.N.Y. 2004) ("Against the backdrop of First Amendment protection for anonymous speech, courts have held that civil subpoenas seeking information regarding anonymous individuals raise First Amendment concerns."); *Grandbouche v. Clancy*, 825 F.2d 1463, 1466 (10th Cir. 1987) ("[W]hen the subject of a discovery order claims a First Amendment privilege not to disclose certain information, the trial court must conduct a balancing test before ordering disclosure." (citing *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977))). As one court described while drawing on principles relevant to the immediate case, "People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identity." *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999).

The constitutional privilege to remain anonymous is not absolute. Plaintiffs may properly seek information necessary to pursue meritorious litigation. *Id.* at 578 (First Amendment does not protect anonymous Internet users from liability for tortious acts

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[4] A court order, even if granted to a private party, is state action and hence subject to constitutional limitations. *See, e.g., Sullivan*, 376 U.S. at 265; *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948). *See also* Illinois Supreme Court Rule 201(b)(2) ("All matters that are privileged against disclosure on the trial . . . are privileged against disclosure through any discovery procedure.").

such as defamation); *Doe v. Cahill*, 884 A.2d at 456 ("Certain classes of speech, including defamatory and libelous speech, are entitled to no constitutional protection."). This ability does not, however, translate to abusive subpoena power targeting those who the litigant may dislike or disagree with.

Accordingly, courts evaluating attempts to unmask anonymous speakers online have adopted consistent standards that balance one person's right to speak anonymously with a litigant's legitimate need to pursue a defense. These courts have recognized that "setting the standard too low w[ould] chill potential posters from exercising their First Amendment right to speak anonymously," and have required Plaintiffs to demonstrate that their defenses are valid and that they have a need for the information before the Court will allow disclosure of the speaker's identity. *Cahill*, 884 A.2d at 457. *See also Dendrite*, 775 A.2d at 760–61; *Highfields Capital Mgmt. L.P. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2004).

2. The Appropriate Standards for Subpoena.

To be consistent under the protections provided to anonymous speakers by the First Amendment and the Illinois Constitution, a structured balancing test must be applied.

The seminal case setting forth First Amendment restrictions upon a litigant's ability to compel an online service provider to reveal an anonymous party's identity is *Dendrite*. Again, the plaintiff must:

(1) make reasonable efforts to notify the accused Internet user of the pendency of the identification proceeding and explain how to present a defense;
(2) set forth the exact statements the Petitioner alleges constitute actionable speech;
(3) allege all elements of the cause of action and introduce prima facie evidence within the litigant's control sufficient to survive a motion for summary judgment; and,
(4) "[f]inally, assuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the

> necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed."

Dendrite, 775 A.2d at 760–61.

This decision accurately and cogently outlines the important First Amendment interests raised by the Defendant. Like the reporter's privilege standard in Illinois, it first requires a prima facie showing of a tenable case, and it gives the court significant discretion in balancing the appropriate interests on a case-by-case basis. The holding and reasoning of *Dendrite* and its progeny should be applied here.

IV. CONCLUSION

First Amendment protection of anonymous speech mandates a structured balancing test in which the plaintiff establishes a prima facie case, supports each element with evidence, and notifies John Doe of pending procedures. The trial court's marginal attempts to balance the First Amendment interests at issue—mandating disclosure to the petitioner while preventing further disclosure—was plainly insufficient as the First Amendment prevents *any* such disclosure absent a showing of evidentiary support for every element of a valid claim. The allegedly defamatory statements, in context, were not susceptible to defamatory meaning. As a result, and after the application of the proper First Amendment standard, the petition should have been denied. *Amici* ask that the Court apply the appropriate heightened First Amendment standard articulated in *Dendrite* and order the denial of Appellee's petition.

DATED: March 15, 2010 By _____

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Rule 341 Certification

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 17 pages.

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Certificate of Service

I certify that the foregoing *Amici Curiae* Brief Of the Electronic Frontier Foundation & The Media Freedom and Information Access Practicum In Support Of Appellant was served upon the following by First Class mail, postage prepaid, upon the following on March 15, 2010:

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