In The
Supreme Court of Virginia

RECORD NO. 140242

YELP, INC.,

Petitioner,

v.

HADEED CARPET CLEANING, INC.,

Respondent.

BRIEF OF AMICI CURIAE AUTOMATTIC, INC., FACEBOOK, INC., GOOGLE INC., MEDIUM, PINTEREST, TRIPADVISOR LLC, AND TWITTER, INC. IN SUPPORT OF APPELLANT YELP, INC.

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici are some of America's leading technology companies, providing services that enable hundreds of millions of people across the United States and around the world to use the power of the Internet to connect, communicate, debate, discover, and share.

Automattic Inc. operates the popular Wordpress.com blogging and publishing platform.

Facebook, Inc. enables people to stay connected with friends and family, to discover what's going on in the world, and to share and express what matters to them through products like Facebook and Instagram.

Google Inc. offers a suite of web-based products and services that include Search, Gmail, Google+, Maps, YouTube, and Blogger.

Medium is an online platform for people to tell and share their ideas and stories, big and small.

Pinterest provides an online tool for people to collect, organize, and share the things and places they love.

TripAdvisor LLC operates the world's largest travel site and connects people with trusted advice to plan their perfect trip.

Twitter, Inc. is a global platform for public self-expression and conversation in real time.

Amici are based in California or Massachusetts, but their services enable people in Virginia and throughout the country to express themselves, both privately and publicly. Amici's services have transformed and elevated this country's long tradition of town halls, private assemblies, robust debate, and anonymous complaints by bringing it online and making it more accessible to people everywhere. As the providers of the online services that people use to exercise their First Amendment right to free speech, amici are committed to protecting their users from invasions of that fundamental right.

Yelp's appeal addresses two issues of concern to amici. First, amici often receive, as nonparties, civil subpoenas from jurisdictions where they do not reside and their records are not located. Challenging those subpoenas requires amici to appear in distant forums, sacrificing time and resources better spent on

innovation and on serving their users. Amici therefore have a strong interest in the principles of state sovereignty that restrict the territorial scope of civil subpoenas, in the nationwide uniformity of procedures for interstate nonparty discovery, and in protections against unreasonable nonparty discovery.

Second, Yelp's appeal concerns the First Amendment right to speak anonymously (or using a pseudonym) through online platforms and services such as those offered by amici. Guarding that fundamental right requires courts to scrutinize civil litigants' attempts to use subpoenas to unmask anonymous speakers. Amici therefore have a strong interest in the proper application of First Amendment standards to civil discovery requests.

ASSIGNMENTS OF ERROR

Amici adopt the assignments of error from Yelp's opening brief.

NATURE OF CASE AND MATERIAL PROCEEDINGS BELOW

Amici adopt the statement of the nature of the case and material proceedings below from Yelp's opening brief.

STATEMENT OF FACTS

Amici adopt the statement of facts from Yelp's opening brief.

AUTHORITIES AND ARGUMENT

I. Standard of Review

This Court reviews questions of law de novo. *See Westgate at Williamsburg Condo. Ass'n. v. Philip Richardson Co.*, 270 Va. 566, 573 (2005).

II. Discussion

Plaintiff Hadeed Carpet Cleaning seeks to unmask an anonymous Yelp commenter who posted allegedly defamatory comments about Hadeed's business. To that end, Hadeed obtained a Virginia subpoena directed to Yelp, a nonparty to this litigation, that is not located in the Commonwealth of Virginia. In affirming enforcement of this subpoena, the Court of Appeals made two fundamental errors. Its judgment should be reversed.

First, in holding that a Virginia civil subpoena could compel a nonresident nonparty to produce documents from outside the Commonwealth, the Court of Appeals erroneously expanded Virginia courts' subpoena power beyond the territorial limitations that are inherent in our federal system. The court read the

statutes governing subpoenas to extend subpoena authority to the limits of personal jurisdiction. As courts of other states have recognized, however, personal jurisdiction and subpoena power are two different concepts, and the latter has traditionally been territorially limited in a way that the former has not.

The decision of the Court of Appeals is also contrary to the Uniform Interstate Depositions and Discovery Act, ("UIDDA"), VA. CODE ANN. §§ 8.01-412.8 et seq. That statute establishes procedures for interstate discovery through subpoenas issued by the state where the discovery is sought—not subpoenas issued by the forum state to nonresident nonparties. The protections afforded by that statute protect Virginia residents from out-of-state discovery, and the Court of Appeals erred in ignoring it.

The circuit court's lack of sovereign authority to issue a subpoena to a nonresident nonparty is a basis for reversing the judgment of the Court of Appeals. But the judgment suffers from a second, independent flaw: it fails to give adequate respect to the First Amendment right to anonymous speech.

The right to speak anonymously would be greatly diminished if those who objected to anonymous speech could readily employ civil discovery to unmask a speaker. The First Amendment therefore requires that a court determine, *before* issuing a subpoena to uncover the identity of an anonymous speaker, that the plaintiff has adequately pleaded a cause of action and that the strength of the cause of action and need for discovery outweigh the speaker's right to remain anonymous. The Court of Appeals erred in failing to require those safeguards here.

A. The Court of Appeals Erred in Affirming the Issuance of a Subpoena to a Nonresident Nonparty

1. A State's Subpoena Power Cannot Reach Beyond the State's Territorial Borders to Compel Discovery from Nonresident Nonparties

A basic principle of our federal system is that a state's subpoena power—the sovereign power of a state to compel production of evidence and attendance by witnesses—cannot reach beyond the state's territorial jurisdiction to nonresidents who are not parties to a case. *See In re Nat'l Contract Poultry Growers' Ass'n*, 771 So. 2d 466, 469 (Ala. 2000); *Colo. Mills,*

LLC v. SunOpta Grains & Foods, Inc., 269 P.3d 731, 733 (Colo. 2012) (en banc); *Phillips Petroleum Co. v. OKC Ltd. P'ship*, 634 So. 2d 1186, 1188 (La. 1994); *Syngenta Crop Prot., Inc. v. Monsanto Co.*, 908 So. 2d 121, 127-28 (Miss. 2005); Timothy L. Mullin, Jr., *Interstate Deposition Statutes: Survey and Analysis*, 11 Univ. Balt. L. Rev. 1, 2 (1981) ("[S]tate courts remain courts of limited territorial jurisdiction. . . . [N]on-parties outside the court's territory are generally not subject to its jurisdiction."). That principle has been recognized by Virginia courts. *See*, *e.g.*, *Thompson v. Fairfax Cnty. Dep't. of Family Servs.*, 62 Va. App. 350, 383 n.18 (2013) ("Like the States, whose authority is circumscribed, subject to limited exceptions, to the borders of each particular State," Indian tribes could not issues subpoenas outside the territorial limits of their reservations) (internal citations omitted). It has deep common-law roots, and it remains firmly embedded in the American legal system today. Ryan W. Scott, *Minimum Contacts, No Dog: Evaluating Personal Jurisdiction for Nonparty Discovery*, Note, 88 Minn. L. Rev. 968,

984 (2003); Rhonda Wasserman, *The Subpoena Power:* Pennoyer's *Last Vestige*, 74 Minn. L. Rev. 37, 46-49 (1989).

The limitation on states' power to subpoena nonresidents to appear or produce in matters in which they are not parties makes practical sense, and it is of particular importance to amici, all of which reside in California or Massachusetts. Amici provide services that are used by people in all 50 states and around the world. But at bottom, they are California- and Massachusetts-based businesses with records custodians outside Virginia.

As California or Massachusetts businesses, amici can expect that they are subject to the law of their home states, to the jurisdiction of those states' courts, and to subpoenas issued and enforced by those courts. They can also expect that if they are a party to a matter in another state, they will be subject to discovery in that state. It is unreasonable, however, for amici to be summoned as nonparties to appear in a court in another jurisdiction. More importantly, it is unreasonable to require amici to do what Yelp has done here: object to an out-of-state subpoena and then litigate its enforcement in a court that lacks

the sovereign power to have issued the subpoena in the first place. In cases such as this one, businesses like amici are "strangers to the . . . litigation . . . [with] no dog in the fight." *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 717 (1st. Cir. 1998). They have not availed themselves of the courts of the Commonwealth as a plaintiff, are not subject to suit, and could not have expected to get dragged into the parties' dispute, yet they have been forced to litigate in a court of limited territorial jurisdiction thousands of miles from where they reside.

Conversely, Virginia residents who are not parties to out-of-state litigation should not have to appear or produce documents or face enforcement of a subpoena in a court in another state. *See Am. Online, Inc. v. Nam Tai Elecs., Inc.*, 264 Va. 583, 587-88 (2002) (then-Virginia resident America Online and its records custodian was subject to nonparty subpoena in Virginia, not California where the litigation was pending); *Am. Online, Inc. v. Anonymous Publicly Traded Co.*, 261 Va. 350, 354-55 (2001) (same, except regarding litigation in Indiana). The limitation on the Commonwealth's subpoena power thus has an obvious

corollary: Virginia residents, including online services companies that might receive subpoenas like those regularly received by amici, are protected from out-of-state subpoenas.

2. Principles of Personal Jurisdiction Do Not Define the Scope of the Subpoena Power

The Court of Appeals believed that "service of a subpoena duces tecum on Yelp's registered agent in Virginia provides jurisdiction for the court to adjudicate the motion to compel." Ct. App. Dec. at 25. But the statute on which it relied for that conclusion makes no mention of subpoenas, referring only to service of "process." VA. CODE ANN. § 13.1-766. And while the Court of Appeals observed that the word "process" can refer to a subpoena, the case on which it relied for that proposition did not consider the extraterritorial enforcement of a subpoena. Ct. App. Dec. at 25 (citing *Bellis v. Commonwealth*, 241 Va. 257, 262 (1991)). Had the General Assembly intended such a radical expansion of the territorial scope of the subpoena power of the Commonwealth's courts, it would have said so clearly.

Service of process on a registered agent may suffice to establish personal jurisdiction, but as the Supreme Court of

Alabama has explained, "[t]he underlying concepts of personal jurisdiction and subpoena power are entirely different" because, while "[p]ersonal jurisdiction is based on conduct that subjects the nonresident to the power of the Alabama courts to adjudicate its rights and obligations in a legal dispute," the subpoena power over a nonparty "is based on the power and authority of the court to compel the attendance of a person at a deposition or the production of documents by a person or entity." *In re Nat'l Contract Poultry Growers*, 771 So. 2d at 469 (citation omitted) (reversing a contempt sanction against a nonresident nonparty that failed to respond to a subpoena); *see also Ulloa v. CMI*, 133 So. 3d 914, 919-20 (Fla. 2013) (holding that the state's personal-jurisdiction statute "does not address or extend the court's subpoena power in a criminal proceeding to require an out-of-state, nonparty corporation to produce documents that are also located out-of-state"); *accord Phillips Petroleum*, 634 So. 2d at 1187 (quashing subpoena directed to a nonresident nonparty); *Syngenta Crop Prot.*, 908 So. 2d at 127 (same). It follows that the ability of a court to assert personal jurisdiction over a

nonresident does not establish that it has subpoena power over that same entity when it is not a party.

For that reason, despite the gradual expansion of personal jurisdiction, the power of a state court to subpoena nonparty witnesses remains constrained to the territory of the state. *See* Wasserman, *supra* at 49 ("Although states have expanded personal jurisdiction, the states have refused to expand the reach of their subpoena power"). That principle requires reversal of the judgment here: the Court of Appeals cannot have affirmed enforcement of a subpoena against a nonresident nonparty where the trial court lacked sovereign authority to issue or enforce the subpoena in the first instance.

3. The Uniform Interstate Depositions and Discovery Act, as Enacted in Virginia, is the Appropriate Mechanism for Interstate, Nonparty Discovery.

Parties to litigation have an interest in obtaining necessary discovery, and courts have an interest in efficiently managing the disputes before them. But the Virginia Legislature has provided a means by which those interests can be accommodated without resort to subpoenas directed to nonresident nonparties.

a. The UIDDA Remedies the Lack of Subpoena Power over Nonparty, Nonresidents and Properly Balances the Competing Interests.

To address the lack of subpoena power over nonresident nonparties, and to provide uniform procedures for interstate discovery, the Uniform Law Commission ("ULC") (then the National Conference of Commissioners on Uniform State Laws) devised the UIDDA. The Virginia Legislature adopted it 2009.

The ULC explained that the UIDDA provides a "simple and efficient" mechanism for interstate discovery:

> [I]t establishes a simple clerical procedure under which a trial state subpoena can be used to issue a discovery state subpoena. The act has minimal judicial oversight: it eliminates the need for obtaining a commission, letters rogatory, filing a miscellaneous action, or other preliminary steps before obtaining a subpoena in the discovery state. The act is cost effective: it eliminates the need to obtain local counsel in the discovery state to obtain an enforcement subpoena. And the act is fair to deponents: it provides that motions brought to enforce, quash, or modify a subpoena, or for protective orders, shall be brought in the discovery state and will be governed by the discovery state's laws.

Nat'l Conference of Comm's on Uniform State Laws, *Uniform Interstate Depositions and Discovery Act as Approved and Recommended for Enactment in All the States*, prefatory note § 3, at 4 (Apr. 3, 2008), *available at* http://www.uniformlaws.org/shared/docs/interstate%20depositions%20and%20discovery/uidda_final_07.pdf (last visited July 29, 2014).

Under the UIDDA, a party seeking out-of-state discovery presents a subpoena from the trial state to a clerk of court in the state where discovery is to be conducted. Once the clerk has endorsed the subpoena, it can be served and responded to in accordance with discovery state's rules. *Id*. § 5, at 8, cmt. That deference to the rules of the discovery state reflects the "significant interest" of that state "in protecting its residents who become non-party witnesses in an action pending in a foreign jurisdiction from any unreasonable or unduly burdensome discovery request." *Id*. If the witness moves to quash, or if the issuing party needs to move to compel compliance with the subpoena, enforcement occurs in the discovery state, thereby protecting "the deponent by requiring that all applications to the

court that directly affect the deponent must be made in the discovery state." *Id*. § 6, at 9, cmt.

The UIDDA's approach is consistent with that followed by federal courts. Under Federal Rule of Civil Procedure 45(d)(3)(A), a subpoena recipient who objects to compliance may move to quash the subpoena in "the court for the district where compliance is required." Similarly, a motion to enforce a subpoena must be filed in the district where compliance is sought, not in the issuing court. Fed. R. Civ. P. 45(d)(2)(B)(i). As the Advisory Committee on Civil Rules has explained, those provisions are specifically intended "[t]o protect local nonparties." Fed. R. Civ. P. 45 advisory committee's note (2013).

The protection of nonparty subpoena recipients is of particular importance to amici, who are recipients of numerous nonparty subpoenas for information about their users. Without the protections afforded by the UIDDA, amici would have to research the procedural rules of numerous states and litigate the validity of subpoenas in distant and unfamiliar forums, wasting time and resources better spent on the innovation that has

enabled amici to develop communications products and services used by hundreds of millions of people throughout the world.

b. Requiring UIDDA Compliance Gives Effect to Virginia Law and the Policies of the UIDDA, Including Protecting Virginia Residents.

Under the decision of the Court of Appeals, the carefully constructed statutory scheme of the UIDDA would serve no purpose: a court in which litigation is pending may directly subpoena witnesses, wherever they happen to reside. The decision therefore contravenes the principle that a court should "not consider actions of the General Assembly to be superfluous." *Commonwealth v. Squire*, 278 Va. 746, 752 (2009). In addition, it ignores the express statutory directive that, "[i]n applying and construing [the UIDDA], consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it." VA. CODE ANN. § 8.01-412.14.

The decision also ignores the sound policy underlying the UIDDA. Before the enactment of the statute, analysis of the proposed UIDDA confirmed that its solution to the issue of subpoena power and balancing of interests was appropriate for

Virginia. In fact, a Boyd Graves Study Committee that evaluated the draft UIDDA "unanimously recommend[ed] the adoption of the legislation." Letter to the Honorable Diane Strickland from Ann K. Sullivan, at 2 (July 2, 2008), *available at* http://c.ymcdn.com/sites/www.vba.org/resource/resmgr/imported/24.%20TAB%2018%20UNIFORM%20INTERSTATE%20DEPOSITIONS%20&%20DISCOVERY%20ACT.pdf. (last visited July 29, 2014).

In its report, the Committee noted that the UIDDA would "address issues related to interstate discovery" and "provide a uniform procedure which could be employed by all jurisdictions to secure compliance with discovery requests originating from litigation in another state." *Id*. at 1. It also recognized the particular value of the UIDDA for residents of Virginia: "there is protection of the rights of Virginia citizens subject to a subpoena to comply with discovery related to litigation in another state. They could challenge it based upon our rules and not those of the foreign jurisdiction." *Id*. at 2. It concluded that the UIDDA would

> simplify interactions with our sister states, reduce the cost of litigation by eliminating the need to retain local counsel to assist with discovery issues, facilitate the ability of

> Virginia practitioners to more effectively represent their clients where discovery was needed in another state, and provide Virginia with the opportunity to take a leadership role in the enactment of progressive legislation.

Id. The Committee thus echoed the analysis of the ULC, applied it to the particular concerns of the Commonwealth, and concluded the UIDDA was necessary and appropriate.

c. The UIDDA is Consistent with the Long History of Interstate Nonparty Discovery in Virginia and This Court's Prior Decisions.

The UIDDA is a successor statute to the Uniform Foreign Depositions Act ("UFDA"), which is now repealed but was enacted in 1958 and codified at VA. CODE ANN. § 8.01-411. In other words, although the UIDDA is a relatively new statute, the recognition of limitations on the Commonwealth's subpoena power have been embedded in Virginia law for more than 50 years. *See Nam Tai Elecs.*, 264 Va. 593 n.8 ("It is self-evident that the UFDA and its equivalent in California exist principally to permit the courts of foreign jurisdictions, through comity, to extend the reach of their discovery proceedings to third parties not immediately within their jurisdiction.").

In fact, this Court has twice-considered the converse of the situation that amici regularly face: an out-of-state litigant seeking identifying information associated with an anonymous online speaker from a service provider, but from a resident of Virginia. And in each case, this Court applied the principles that are now codified in the UIDDA.

In 2001, in *Anonymous Publicly Traded Company* ("*APTC*"), the Court considered whether an Indiana litigant could "utilize the coercive powers of Virginia courts under the [UFDA]" to compel AOL to produce identifying information for four AOL users. 261 Va. 350, 354-55. Notably, the Indiana litigant did not issue an Indiana subpoena but instead applied to the Indiana court for an order authorizing it to seek discovery in Virginia, and then had the Clerk of Court of Fairfax County issue a subpoena to AOL. *Id*. at 355-56. When AOL moved to quash the subpoena, it did so in courts of Virginia. *Id*. at 356. Although this Court recognized that the UFDA was "rooted in the principles of comity and provides a mechanism for discovery of evidence in aid of actions pending in foreign jurisdictions," it held that the Indiana order was not

automatically deserving of enforcement under the UFDA. *Id*. at 360. Instead, the Court conducted its own independent analysis of the validity of the subpoena under Virginia law (the law of the discovery state) to ensure that the rights of the resident of Virginia were protected against infringement by an out-of-state litigant. *Id*. at 362-65. Ultimately, the Court determined that the subpoena should be quashed. *Id.* at 365.

Similarly, in 2002, in *Nam Tai Electronics*, a litigant in a California state court sought AOL subscriber information. The California court did not attempt to subpoena AOL but instead issued an out-of-state discovery commission; the litigant then had a subpoena issued to AOL from the Circuit Court of Loudon County. 264 Va. at 587-88. As in *APTC*, litigation over the propriety of the subpoena occurred in Virginia, not California. *Id*. Although this Court ultimately decided to enforce the out-of-state commission, it did so only after assuring itself that "enforcement of the foreign court order [was] not contrary to the public policy of Virginia" and would not "prejudice the rights of Virginia or her citizens." *Id*. at 591-92; *see also* David M. Cotter, Division of

Legislative Services, *Uniform Interstate Depositions and Discovery Act Review of 2007 Annual Meeting Draft*, at 9 ("The considerations enumerated by the Virginia Supreme Court in [*Nam Tai Electronics*] essentially mirror the considerations of the drafters of the UIDDA, particularly the issue of conflicts of law and the protection of the rights of the citizens of the discovery state.") *enclosed with* Letter to the Honorable Diane Strickland from Ann K. Sullivan (July 2, 2008), *available at* http://c.ymcdn.com/sites/www.vba.org/resource/resmgr/imported/24.%20TAB%2018%20UNIFORM%20INTERSTATE%20DEPOSITIONS%20&%20DISCOVERY%20ACT.pdf. (last visited July 29, 2014).

In each case, the UFDA procedures for obtaining discovery from nonresident nonparties worked as they should. First, the out-of-state litigant invoked the sovereign subpoena power of Virginia to seek discovery within Virginia. Next, the response and litigation over the propriety of the subpoena occurred within the discovery state. And finally, the courts of Virginia with sovereign authority over residents of the Commonwealth adjudicated the rights of its residents.

That is exactly the procedure and balancing of competing interests embodied in the UIDDA as enacted in Virginia: a uniform and fair process that assists out-of-state litigants seeking discovery from nonparties and also protects deponents from unreasonable or unduly burdensome discovery. Moreover, as those cases illustrate, consistent application of the UIDDA protects the interests of Virginia residents in out-of-state litigation. This Court should give effect to the UIDDA and reverse the decision of the Court of Appeals affirming a subpoena that far exceeded the territorial limitations on its power to compel.

B. The Court of Appeals Erred in Failing to Protect the First Amendment Rights of Anonymous Online Speakers

Even if the subpoena in this case had been within the territorial jurisdiction of the issuing court, it would still have been improper because the issuing court failed to adhere to either the procedural or the substantive standards that the First Amendment requires for subpoenas seeking to unmask anonymous speakers. The Court of Appeals erred in holding otherwise.

1. The First Amendment Protects the Right to Anonymous Speech, Including Through Online Services Such as Those Provided by Amici

The First Amendment to the United States Constitution provides that Congress "shall make no law . . . abridging the freedom of speech." U.S. CONST. AMEND. I. The Fourteenth Amendment extends that protection to the states. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925). In addition, the Virginia Constitution provides that "any citizen may freely speak, write, and publish his sentiments on all subjects," VA. CONST. ART. I, § 12, a provision that, this Court has held, affords even broader protection to speech than does the First Amendment. *Robert v. City of Norfolk*, 188 Va. 413, 420 (1948).

The freedom of speech protected by the First Amendment includes the right to speak anonymously. *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182 (1999); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960). As the United States Supreme Court has observed, "[u]nder our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition

of advocacy and of dissent." *McIntyre*, 514 U.S. at 357. Indeed, that tradition not only predated the Constitution but also played an important role in its adoption. *See id.* at 342; *id.* at 360 (Thomas, J., concurring) ("The essays in the Federalist Papers, published under the pseudonym of 'Publius,' are only the most famous example of the outpouring of anonymous political writing that occurred during the ratification of the Constitution.").

Protecting anonymous speech is critical to ensuring that public debate is "uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Anonymity, the Supreme Court has explained, "is a shield from the tyranny of the majority," and it "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." *McIntyre*, 514 U.S. at 357. The right to anonymity is protected whatever the speaker's motivation for remaining anonymous may be. *Id.* at 341-42. And it is applicable to speech about economic and commercial affairs, just as it is to political speech. *See Va. State*

Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976) ("So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed.").

Although amici's services differ, they all allow the people who use them to share stories and ideas online through words, photographs, and videos, and to convene groups and virtual assemblies.[1] Amici's services are the modern-day versions of

[1] The freedom of expression is central to amici's businesses. Google's mission is to "organize the world's information and make it universally accessible and useful." About Google, GOOGLE, http://www.google.com/about/ (last visited July 29, 2014). Facebook's mission is to "give people the power to share and make the world more open and connected." About, FACEBOOK, https://www.facebook.com/facebook/info (last visited July 29, 2014). Wordpress (operated by Automattic) has as its mission to "democratize publishing one website at a time." About Us, WORDPRESS, http://en.wordpress. com/about/ (last visited July 29, 2014). Twitter's mission is to "give everyone the power to create and share ideas and information instantly, without barriers." About, TWITTER, https://about.twitter.com/ company (last visited July 29, 2014). TripAdvisor sites "make up the largest travel community in the world, reaching nearly 280 million unique monthly visitors, and more than 170 million reviews and opinions covering more than 4 million accommodations,

print newspapers, town halls, pamphlets, and public squares, and every day, people across the country use amici's services to engage in speech protected by the First Amendment. *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844, 853, 870 (1997) ("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, mail exploders, and newsgroups, the same individual can become a pamphleteer."); *Bland v. Roberts*, 730 F.3d 368, 386 (4th Cir. 2013) (holding that "liking" on Facebook is protected under the First Amendment).

The President of the United States and other public servants engage with the public through amici's services. *See, e.g.*, *@PressSec on Twitter strategy, role in White House,* Interview with Josh Earnest, White House Press Secretary, Politico, June 23,

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restaurants and attractions." About TripAdvisor, TRIPADVISOR, http://www.tripadvisor.com/Press Center-c6-About_Us.html (last visited July 29, 2014). Pinterest "is a place to discover ideas for all your projects and interests, hand-picked by people like you." About Pinterest, PINTEREST, http://about. pinterest.com/en (last visited July 29, 2014). Medium is "a new place on the Internet where people share ideas and stories . . . [i]t's designed for little stories that make your day better and manifestos that change the world." Welcome to Medium, MEDIUM, https://medium. com/about/9e53ca408c48 (last visited July 29, 2014).

2014 ("[Twitter] is part of our day-to-day, hour-to-hour existence here at the White House."); Ashley Parker, *In Nonstop Whirlwind of Campaigns, Twitter Is a Critical Tool*, N.Y. Times, January 28, 2012 ("Twitter has emerged as a critical tool for political campaigns, allowing them to reach voters, gather data and respond to charges immediately."). The public, in turn, uses amici's services to comment on politicians and voice their concerns about our government, *see* Parker, *supra*, to discuss conditions at their workplace, *see* Steven Greenhouse, *Even If It Enrages Your Boss, Social Net Speech Is Protected*, N.Y. Times, January 21, 2013, and to organize unions, *see The NLRB and Social Media*, NLRB, http://www.nlrb.gov/news-outreach/fact-sheets/nlrb-and-social-media (last visited July 29, 2014).

This Court has held that the right to anonymous speech is fully applicable to online speech. *Jaynes v. Commonwealth*, 276 Va. 443, 461 (2008); *accord* Ct. App. Dec. at 7 ("[T]he anonymous speaker has the right to express himself on the Internet without the fear that his veil of anonymity will be pierced for no other reason than because another person disagrees with

him."). Other courts applying the First Amendment have reached the same conclusion. *See*, *e.g.*, *United States v. Cassidy*, 814 F. Supp. 2d 574, 582-83 (D. Md. 2011) (holding that anonymous speech on Twitter is protected by the First Amendment). Indeed, the right to speak anonymously is even more important in the online context because "[t]he free exchange of ideas on the Internet is driven in large part by the ability of Internet users to communicate anonymously." *Doe v. 2theMart.com, Inc.*, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001); *accord Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999). The power of the Internet and of amici's services is that anyone, anywhere, has the platform and tools to exercise their right to speak, publish, and debate without fear of retaliation. It is that right that this Court should protect in this case.

2. Protecting Speakers' Rights to Remain Anonymous Requires Judicial Review of a Subpoena Seeking Their Identifying Information Before It Issues

Section 8.01-407.1 of the Virginia Code specifies procedures for the issuance of a subpoena seeking to disclose the identity of an anonymous online speaker. Although the provision requires

that the proponent of such a subpoena demonstrate that the subpoena is justified, the statute is silent on whether the court must review the sufficiency of that showing. The Court of Appeals appears to have contemplated that no pre-issuance judicial review is necessary and that the role of the court is limited to ruling on objections, if any, asserted by the recipient of the subpoena. That approach is insufficiently protective of the important constitutional interests at issue.

The Supreme Court has held that due process generally requires a pre-deprivation hearing, where feasible, before property is taken. *Zinermon v. Burch*, 494 U.S. 113, 132 (1990). Because the failure to provide pre-issuance judicial review in this context threatens speakers' constitutionally protected right to anonymity, and because providing such review would not be burdensome, the statute should be construed to require it.

By the time a service provider receives a civil subpoena seeking a user's identifying information, an online speaker's First Amendment right to anonymity is already at risk. Service providers such as amici are ill-suited to examine subpoenas to

determine whether to assert a First Amendment objection. Yet the procedure established by the Court of Appeals, which requires no constitutional balancing *before* the issuance of a subpoena, forces them to do just that. A nonparty service provider may be an out-of-state corporation with no knowledge of Virginia law. It is likely to have no access to documents related to the underlying case and little or no knowledge of the plaintiff's claims. And it is therefore in no position to determine whether the plaintiff's claim is sufficient to intrude on an anonymous speaker's rights.

Nor can speakers themselves adequately protect their rights. Although anonymous users have standing to contest the constitutionality of a subpoena that seeks to reveal their identity, VA. CODE ANN. § 8.01-407.1(A)(4), they will not necessarily have notice of the subpoena. To be sure, the statute requires litigants seeking a subpoena to identify an anonymous speaker to represent that "other reasonable efforts" to contact the speaker were fruitless, *id*. § 8.01-407.1(A)(1)(b), but the lack of prior judicial review of that representation leaves open the possibility that a litigant's "reasonable efforts" may not be sufficient to

provide notice to the speaker. There is also the temptation for litigants to shortcut the requirement. The burden of tracking down and notifying the anonymous defendant should be squarely on the plaintiff, not shifted to a nonparty. *Cf. Doe v. Cahill*, 884 A.2d 451, 460–61 (Del. 2005) (placing the burden of providing notice on the plaintiff and noting that "[t]he notification provision imposes very little burden on a defamation plaintiff while at the same time giving an anonymous defendant the opportunity to respond").

The risk of improper unmasking of service providers' users will stifle the innovation of existing service providers, such as amici, as well as the future growth of new communications platforms, products, and services, all to the detriment of the general public who relies on these services and benefits from technological innovations. Service providers may be hesitant to implement new features or technologies if they know that they will be exploited by litigants wishing to harass and silence those whose opinions they do not like. Similarly, this known vulnerability will chill speech and hinder the entrance into the

market of new technologies. Additionally, the diversion of resources to responding to and analyzing subpoenas issued under the Virginia statute will inhibit investment in developing new products and services.

Conversely, the burden of a pre-issuance hearing would be minimal. The statute already requires that a proposed subpoena and the supporting materials required by VA. CODE ANN. § 8.01-407.1(A)(1) be submitted to the court before the subpoena becomes effective. Rather than waiting for an objection that the user and the provider may be unable to make, the court could simply review the materials itself and make an informed determination that balances the right to speak anonymously with "the right of the plaintiff to protect its proprietary interests and reputation." *Dendrite Int'l Inc. v. Doe*, *No. 3*, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001).

The process established by the Court of Appeals improperly shifts the burden of discovery to nonparties, and it endangers speakers' First Amendment rights. Those results should be

avoided by reading the statute to require pre-issuance judicial review.

3. The First Amendment Requires a Higher Standard Than That Accepted by the Court of Appeals

The Court of Appeals held that a civil subpoena to unmask an anonymous user may issue upon a showing that "the party requesting the subpoena has a legitimate, good faith basis to contend that such party is the victim of conduct actionable in the jurisdiction where the suit was filed." Ct. App. Dec. at 15. That test does not provide the protection the First Amendment requires. Instead, it allows almost any plaintiff who files a complaint against an anonymous speaker to go forward with unmasking.

That low bar to unmasking is out of step with the approach taken by the majority of courts across the country, which have held that heightened scrutiny of a plaintiff's complaint is required before the plaintiff may proceed with unmasking his anonymous opponent. That overwhelming trend reflects a recognition that the tradition of anonymous speech has taken root on the Internet,

and that judicial scrutiny is critical to stopping litigants from using the courts to undermine the right to anonymous speech.

This Court should read the Virginia statute to require similar heightened scrutiny so that the First Amendment rights of anonymous speakers subject to Virginia law will not be afforded less protection than elsewhere in the United States.

a. An Emerging National Consensus Recognizes That the First Amendment Requires Heightened Scrutiny of Subpoenas Seeking to Unmask Anonymous Speakers

State courts across the country have held that a heightened level of scrutiny applies when a civil litigant seeks to unmask an anonymous speaker using civil discovery. The leading cases establishing that widely adopted standard of review are *Dendrite Int'l,* 775 A.2d 756 and *Cahill*, 884 A.2d 451.

Dendrite involved an interlocutory appeal of a trial court order denying a plaintiff's request to conduct expedited discovery to ascertain the identity of an online speaker in a defamation action. The New Jersey appellate court held that determining whether to unmask an anonymous online speaker involves

"striking a balance between the well-established First Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interests and reputation through the assertion of recognizable claims based on the actionable conduct of the anonymous . . . defendants." 775 A.2d at 760. The court set guidelines for striking that balance, which include requiring the plaintiff to attempt to notify the speaker and also requiring these safeguards:

1. The plaintiff must "identify and set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech." *Id*. at 760.
2. "The complaint and all information provided to the court should be carefully reviewed to determine whether plaintiff has set forth a prima facie cause of action . . . ." *Id*.
3. In addition to establishing that the complaint could survive a motion to dismiss, "the plaintiff must produce sufficient evidence supporting each element of its cause of action, on a prima facie basis." *Id*.
4. Finally, only if the other elements are met, "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." *Id.* at 760-61.

Five other state appellate courts have adopted this standard. *See Mobilisa, Inc. v. Doe*, 170 P.3d 712 (Ariz. Ct. App. 2007); *In re Ind. Newspapers*, 963 N.E.2d 534 (Ind. Ct. App. 2012); *Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432 (Md. 2009); *Mortg. Specialists, Inc. v. Implode-Explode Heavy Indus., Inc.*, 999 A.2d 184 (N.H. 2010); *Pilchesky v. Gatelli*, 12 A.3d 430 (Pa. Super. Ct. 2011).

Other state courts have adopted a modified version of the *Dendrite* standard, as first espoused by the Delaware Supreme Court in *Cahill*. The *Cahill* test also requires that the plaintiff attempt to notify the speaker, but it combines *Dendrite*'s elements into a single requirement that the court subject the plaintiff's complaint and supporting materials to a "summary judgment inquiry." *Cahill*, 884 A.2d at 460-61. This test "subsume[s]" the elements of the *Dendrite* test, including the final balancing of the plaintiff's and speaker's rights. *Id*. at 461. Courts in at least three other states and the District of Columbia have adopted this approach. *See Doe v. Coleman*, ___ S.W.3d ___, No. 2014-CA-000293-OA, 2014 WL 2785840 (Ky. Ct. App.

June 20, 2014); *Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231 (Cal. Ct. App. 2008); *Solers v. Doe*, 977 A.2d 941 (D.C. 2009); *In re Does 1-10*, 242 S.W.3d 805 (Tex. App. 2007).

Federal courts have repeatedly adopted the *Dendrite* or *Cahill* standards to ensure that First Amendment safeguards are established to protect anonymous speakers. *See, e.g.*, *SaleHoo Grp. v. ABC Co.*, 722 F. Supp. 2d 1210, 1214 (W.D. Wash. 2010) (adopting the *Dendrite* standard and finding that "[t]he case law, though still in development, has begun to coalesce around the basic framework of the test articulated in *Dendrite*"); *Sinclair v. TubeSockTedD*, 596 F. Supp. 2d 128, 132 (D.D.C. 2009) (holding that plaintiff would lose under either the *Dendrite* or *Cahill* standard); *Doe I v. Individuals*, 561 F. Supp. 2d 249, 254-56 (D. Conn. 2008) (requiring plaintiff to provide sufficient evidence to plead a prima facie cause of action to ensure that "plaintiffs do not use discovery to harass, intimidate or silence critics in the public forum") (internal quotation marks and citations omitted); *Highfields Capital Mgmt., L.P. v. Doe*, 385 F. Supp. 2d 969, 976 (N.D. Cal. 2005) (requiring plaintiff to show a "real evidentiary

basis" that the defendant engaged in wrongdoing); *see also In re Anonymous Online Speakers*, 661 F.3d 1168, 1176-77 (9th Cir. 2011) (holding that it was not clear error for a district court to apply the *Cahill* standard to unmasking an anonymous speaker).

Two states—Illinois and Michigan—have not formally adopted the *Dendrite* or *Cahill* standards but have nonetheless required a heightened standard similar to *Dendrite* and *Cahill*. *See Stone v. Paddock Publ'ns Inc.*, 961 N.E.2d 380 (Ill. App. Ct. 2011) (before a subpoena to unmask an anonymous speaker may issue, the litigant must file a verified petition for discovery that states with particularity facts supporting a cause of action for defamation; seeks only the identity of the potential defendant; and is subjected to a hearing to allow the court to determine whether the litigant has sufficiently stated a cause of action against the unnamed target) (citing *Maxon v. Ottawa Publ'g. Co.*, 929 N.E.2d 666 (Ill. App. Ct. 2010)); *Ghanam v. Does*, 845 N.W.2d 128 (Mich. Ct. App. 2014) (holding that a plaintiff seeking to unmask an anonymous speaker must make reasonable efforts to notify the speaker, and that before the subpoena may issue,

the trial court must analyze the complaint under the Michigan standards for summary judgment). These courts, like the courts in *Dendrite* and *Cahill*, have recognized that allowing a subpoena to issue to unmask an anonymous speaker without first evaluating the merits of the plaintiff's claims fails to provide the required First Amendment protection to the right to speak anonymously.

b. This Court of Appeals' Interpretation of the Statute Fails to Protect First Amendment Interests

The Court of Appeals held that VA. CODE ANN. § 8.01-407.1(A)(1)(a) requires only that "the party requesting the subpoena has a legitimate, good faith basis to contend that such party is the victim of conduct actionable in the jurisdiction where the suit was filed." Ct. App. Dec. at 15. That interpretation fails to protect the First Amendment rights of anonymous speakers, including those who use amici's services, and it would render the statute unconstitutional. *Copeland v. Todd*, 282 Va. 183, 193 (2011) ("[W]e have a duty to construe statutes subject to a constitutional challenge in a manner that avoids any conflict with

the Constitution.") (internal quotation marks and citation omitted). The court's interpretation is deficient in two respects.

First, according to the Court of Appeals, a plaintiff can show a "legitimate, good faith" basis without submitting any evidence that a statement, such as one communicated through amici's services, was actionable; instead, a plaintiff merely need assert a "belief" that communications were tortious. Ct. App. Dec. at 15–16. Pleading on mere belief, however, is subject to abuse and allows plaintiffs to use civil discovery improperly to "ascertain the identities of unknown defendants in order to harass, intimidate or silence critics." *Dendrite*, 775 A.2d at 771; *see also Cahill*, 884 A.2d at 457 ("[T]he sudden surge in John Doe suits stems from the fact that many defamation actions are not really about money. The goals of this new breed of libel action are largely symbolic, the primary goal being to silence John Doe and others like him.") (alterations omitted) (internal quotation marks and citations omitted); *see also McIntyre*, 514 U.S. at 357 (noting that anonymity "protect[s] unpopular individuals from retaliation—and their ideas from suppression").

Because of this risk of abuse, courts across the country have rejected the "legitimate, good faith" standard, which is easily exploited by plaintiffs without a valid claim who merely seek to silence those who voice opinions that they dislike. As the *Cahill* court explained, plaintiffs can easily "plead sufficient facts to meet the good faith test . . . , even if the defamation claim is not very strong, or worse, if they do not intend to pursue the defamation action to a final decision." 884 A.2d at 457. Once the plaintiff has learned the identity of the anonymous critic, "a defamation plaintiff who either loses on the merits or fails to pursue a lawsuit is still free to engage in extra-judicial self-help remedies." *Id.*

The Court of Appeals believed that "the General Assembly . . . made the policy decision to include or exclude factors that other states use in their unmasking standards." Ct. App. Dec. at 16, 18. The legislative history indicates that, although the drafters of VA. CODE ANN. § 8.01-407.1 were aware that "the level of proof required" to establish tortious or illegal speech "will have a dramatic effect on the number and efficacy of applications" under

the statute, they nonetheless rejected the heightened standards set forth in *Dendrite* and *Cahill*. Discovery of Electronic Data, S. Doc. No. 9, at 45 (2002). The reason appears to have been a desire to streamline the process for Virginia courts and to prevent Virginia courts from having to evaluate the merits of a lawsuit pending in a foreign jurisdiction and to apply foreign law. *Id.* ("The good faith basis test . . . allows reasoned adjudication without turning the Virginia proceeding into a final decision on the merits of the action, in a factual vacuum and applying what may be unfamiliar legal principles.").

But in cases such as this one, in which the subpoena issues from a case in a Virginia court, those considerations are absent. And where the subpoena relates to a case pending in another jurisdiction, the UIDDA provides a remedy: the Virginia Court may rely on the First Amendment safeguards implemented by the court in the jurisdiction in which the case is pending. In any event, a legislative policy decision has no bearing on the constitutionality of a statute, and as applied by the Court of Appeals, Section 8.01-407.1(A)(1)(a) sets the bar for unmasking

an anonymous online speaker lower than the First Amendment requires.

Second, the decision of the Court of Appeals fails to require "balanc[ing] 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." *Dendrite*, 775 A.2d at 760–61. The statute requires a judicial determination that "the identity of the anonymous communicator is important, is centrally needed to advance the claim, relates to a core claim or defense, or is directly and materially relevant to that claim or defense." VA. CODE ANN. § 8.01-407.1(A)(1)(c). The Court of Appeals held that this provision allows circuit courts "some leeway to apply a balancing test" and therefore "must necessarily balance the interests of the anonymous communicator against the interest of the plaintiff in discovering [his] identity." Ct. App. Dec. at 16. But mere "leeway to apply a balancing test" falls short of the First Amendment requirement that a court actually balance the equities before unmasking an anonymous speaker.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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Amici also certify that all counsel have provided written consent to the filing of this brief, and an electronic copy of this brief has been served vie e-mail scvbriefs@courts.state.va.us and a copy of this brief has been served UPS, Ground today, July 30, 2014, to counsel. Finally, amici certify that the word processing software used for this brief shows that it has 7,862 words, including headings, footnotes, and quotations but excluding its

cover page, tables of contents and authorities, and this certificate.

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