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Can a One-Star Review Get You Sued? The Right to Anonymous Speech on the Internet and the Future of Internet “Unmasking” Statutes, 48 J. Marshall L. Rev. 693 (2015)

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CAN A ONE STAR REVIEW GET YOU SUED? THE RIGHT TO ANONYMOUS SPEECH ON THE INTERNET AND THE FUTURE OF INTERNET “UNMASKING” STATUTES

JESSE LIVELY*

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I. INTRODUCTION

Perhaps Justice Black was correct when he explained the importance anonymity has played "in the progress of mankind" by allowing "[p]ersecuted groups and sects from time to time throughout history . . . to criticize oppressive practices and laws."¹ Since the revolutionary era, an individual's right to speak and write anonymously has been a component of the First Amendment.²

1. Talley v. California, 362 U.S. 60, 64-65 (1960).

2. See, e.g., Victoria Smith Ekstrand & Cassandra Imfeld Jeyaram, *Our*

History shows that the Framers engaged in anonymous political writing, perhaps most famously when Alexander Hamilton, John Jay, and James Madison published eighty-five essays known as “The Federalist Papers” under the pseudonym “Publius.”³ However, while individuals have historically used newspapers to speak anonymously, over the last decade, individuals have used the Internet to speak anonymously.⁴

The introduction and mass increase of digital and online Internet communications over the last decade has challenged established legal rules and the basic premises of the traditional First Amendment anonymous free speech doctrine.⁵ Today, millions of people rely on online reviews in order to make decisions regarding what products and services they purchase, where to travel, and many other choices.⁶ Reviews by users can reveal problems and defects with products warning potential consumers of the risks of a product or service and in some cases even leading companies to remedy the problem and do right by the consumer.⁷ Additionally, the nature of the Internet and the characteristics of online speech have “sparked an avalanche of legal claims” over the privacy rights of online speakers.⁸ A large number of online privacy lawsuits center around the requested identification of anonymous online posters.⁹ As a result, lawyers, judges, and scholars have “struggled to reconsider the rationales for and the limits of anonymity in the Internet age.”¹⁰ One challenge that has come to the forefront in developing model legal standards is determining when the harms of

Founding Anonymity: Anonymous Speech During the Constitutional Debate, 28 AM. JOURNALISM 35, 53 (2011) (arguing that anonymous speech was “inextricably linked” to the founding of the nation).

3. See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 360 (1995) (Thomas, J., concurring) (illustrating the outpouring of anonymous political writing that occurred during the ratification of the Constitution).

4. See Sophia Qasir, Note, *Anonymity in Cyberspace: Judicial and Legislative Regulations*, 81 FORDHAM L. REV. 3651, 3652 (2012) (stating that the expansion of the Internet is stretching the outer limits of anonymous speech rights).

5. See Jason M. Shepard & Genelle Belmas, *Anonymity, Disclosure and First Amendment Balancing in the Internet Era: Developments in Libel, Copyright, and Election Speech*, 15 YALE J.L. & TECH. 92, 94 (2012) (discussing the history behind anonymous speech and the First Amendment).

6. See Susannah Fox & Maeve Duggan, *Peer-to-Peer Health Care*, PEW RESEARCH INTERNET PROJECT (Jan. 15, 2013), <http://www.pewInternet.org/2013/01/15/peer-to-peer-health-care> (reporting that 80 percent of Internet users consult online reviews).

7. See David Kirkpatrick, *Why There’s No Escaping the Blog*, FORTUNE (Jan. 10, 2005), http://archive.fortune.com/magazines/fortune/fortune_archive/2005/01/10/8230982/index.htm (reporting that an anonymous review claiming a flaw in a bike lock caused the company to replace approximately 100,000 locks for free).

8. Shepard & Belmas, *supra* note 5, at 94.

9. Robert D. Brownstone, 1 Data Sec. & Privacy Law § 9:170 (2014).

10. Shepard & Belmas, *supra* note 5, at 95.

anonymity are significant enough to justify an incursion on the right to anonymity.¹¹

Recently, in *Yelp v. Hadeed Carpet Cleaning*, the Virginia Court of Appeals addressed whether Yelp, an online social network review service, could be forced to reveal the identities of anonymous reviewers for the purposes of a defamation suit.¹² The court held that, under Virginia's "unmasking" statute, section 8-01-407.1, "a local business was entitled to enforce a subpoena against a social media reviewing site, to reveal information leading to the identities of reviewers."¹³ The court's decision and the standard it used to make that decision contravenes other court decisions, such as *Dendrite International v. Doe*, *Doe v. Cahill*, and standards from other jurisdictions, which address the same question.¹⁴

This Comment argues that the Supreme Court of Virginia should first reverse the Virginia Court of Appeals' decision when it hears the *Yelp* case later this year. Secondly, the court should hold that the Virginia statute for identifying persons communicating anonymously over the Internet violates the First Amendment's required showing of merit on both law and facts before a subpoena *duces tecum* to identify an anonymous speaker can be enforced.¹⁵ Lastly, it should adopt a new "unveiling standard" similar to the standards used in either *Dendrite* or *Cahill*.¹⁶ Part II examines the jurisprudential history of identifying anonymous Internet speakers in defamation cases, namely the prominent standards that have been adopted in many other jurisdictions such as Maryland, Delaware, and New Jersey. Part III argues that the Virginia Court of Appeals incorrectly interpreted Virginia Code section 8.01-407.1 and erred in finding the statute constitutional. Part IV concludes that requiring the identification of anonymous Internet users in defamation cases can be consistent with the First Amendment as long as the identification findings are consistent with the *Dendrite* standard.

11. See *id.* at 98 (addressing the notion that First Amendment right to anonymity, while important, cannot be absolute).

12. See generally *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 752 S.E.2d 554 (Va. Ct. App. 2014).

13. See *id.* at 566.

14. See *Doe v. Cahill*, 884 A.2d 451, 460 (Del. 2005) (developing one standard for when the identity of an anonymous defendant should be revealed); *Dendrite Int'l, Inc. v. Doe No. 3*, 775 A.2d 756, 771-72 (N.J. Super. Ct. App. Div. 2001) (setting forth another standard with regard to revealing a defendant's identity).

15. See generally VA. CODE ANN. § 8.01-407.1 (2014) (requiring a showing of merit on both law and facts before a subpoena *duces tecum* can be enforced to identify an anonymous speaker).

16. See John Villasenor, *When Should The Authors Of Anonymous Online Reviews Be Revealed? Yelp Challenges A Court 'Unmasking' Order*, FORBES (Feb. 7, 2014), <http://onforb.es/1o1KEab> (discussing how many courts have adopted either the *Dendrite* or the *Cahill* tests).

II. BACKGROUND

A. *The First Amendment and the Right to Anonymity*

Anonymity has a long history in American discourse, and the right to speak anonymously is protected by the First Amendment.¹⁷ The Supreme Court has held that content-based restrictions on fully protected speech imposed by states and compelled identification of anonymous persons are valid if “narrowly tailored to serve a compelling state interest.”¹⁸ For example, in *Talley v. California*, the Court held unconstitutional a city ordinance that prohibited the distribution of anonymously printed handbills.¹⁹ Thirty-five years later, the Supreme Court expanded the protections for anonymous free speech in *McIntyre v. Ohio Elections Commission*, striking down an Ohio statute prohibiting the distribution of anonymous campaign literature, and stating that an author’s decision to remain anonymous was “an aspect of the freedom of speech protected by the First Amendment.”²⁰ In *Reno v. American Civil Liberties Union*, the Supreme Court held that online speech should enjoy the same First Amendment constitutional protection as traditional forms of speech.²¹

B. *Defamation and the Limitations of Free Speech*

While the Supreme Court has held that the value of free speech is accorded greater weight than the dangers of its potential misuse, the right to speak anonymously is not absolute, and plaintiffs have the right to seek redress for harmful anonymous speech under a claim of defamation.²² In *Air Wisconsin Airlines Corp. v. Hoepfer*, the Court explained that the falsity of a statement is only material to a defamation claim if the statement affects the subject’s reputation in the community.²³

17. See, e.g., *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342 (1995) (stating that this freedom traditionally extended beyond the literary realm).

18. See *id.* at 335 (identifying that restrictions on this type of speech are subject to strict scrutiny).

19. See *Talley v. California*, 362 U.S. 60, 64–65 (1960) (discussing how the Supreme Court struck the ordinance down).

20. See *McIntyre*, 514 U.S. at 342 (arguing that anonymous works outweigh any public interest in requiring disclosure).

21. See 521 U.S. 844, 885 (1997), *aff’g* 929 F. Supp. 824 (E.D.Pa. 1996).

22. See *McIntyre*, 514 U.S. at 353, 357–58.

23. See *Air Wis. Airlines Corp. v. Hoepfer*, 134 S. Ct. 852, 856 (2014) (defining a materially false statement as one that would have a different effect on the mind of the reader or listener from that which the truth would have produced).

1. Commercial Speech

While anonymous speech can be defamatory, it can only be punished in full accordance with First Amendment principles.²⁴ However, courts have held that less protection is offered to “commercial speech” as compared to literary, religious, or political speech.²⁵ In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the Supreme Court defined commercial speech as expressions that are solely related to the “economic interests of the speaker and its audience.”²⁶ The Court, however, has made clear that commercial speech is an extremely narrow category and is limited to advertising that does no more than “propose a commercial transaction.”²⁷ The Court stated that the definition of “proposing a commercial transaction” intended to encompass any advertising that informed possible buyers where to buy an item, the price of a item, and the advantages of an item.²⁸ The Fourth Circuit has also gone on to list other factors that determine whether speech is considered commercial, including whether it is an advertisement,²⁹ refers to a specific product or service, and whether the speaker has an economic motivation.³⁰ In *Lefkoe v. Joseph A. Bank Clothiers*, the Fourth Circuit held that an anonymous stockholder’s letter to a company’s audit committee was commercial speech because the letter was solely related to the economic interest of the speaker and its audience.³¹

In *Bose Corp. v. Consumers Union of United States, Inc.*, the Court indicated that the First Amendment protected the publication of information and opinions about products offered to

24. See *Yelp v. Hadeed Carpet Cleaning, Inc.*, 752 S.E.2d 554, 560 (Va. Ct. App. 2014) (stating that defamation is not immune from constitutional limitations and must be measured by standards that satisfy the First Amendment).

25. See *id.* (explaining that commercial speech is accorded less First Amendment protection than other forms of speech).

26. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 561, 563 (1980) (defining commercial speech as speech that serves the economic interest of the speaker and also assists consumers and furthers societal interest).

27. See *id.* at 562 (distinguishing between speech proposing commercial transaction and other varieties of speech).

28. See *id.* at 580 (citing examples such as a salesman’s solicitation, a broker’s offer, and a manufacturer’s publication of a price list or the terms of his standard warranty).

29. See *Advertising*, BLACK’S LAW DICTIONARY (9th ed. 2009), available at Westlaw BLACK’S LAW DICTIONARY (defining advertising as alerting the public to promote a sale).

30. See *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, 721 F.3d 264, 285 (4th Cir. 2013) (listing factors to consider in deciding whether speech is commercial).

31. See *Lefkoe v. Jos. A. Bank Clothiers, Inc.*, 577 F.3d 240, 248 (4th Cir. 2009) (agreeing that the Doe Client’s letter was commercial speech).

the public.³² The Supreme Court has held that criticism of a commercial product or service is not commercial speech simply because it might injure the plaintiff's business interests, and even if it is commercial speech, it can still be fully protected if it is truthful.³³ The Court has also ruled that commercial speech may be restrained if it is false, misleading, or advertises unlawful activity and that any governmental restraint must advance a substantial public interest and must not be more extensive than necessary to serve that interest.³⁴

2. *Libel-Proof Plaintiff Doctrine*

In many jurisdictions, plaintiffs may not challenge a negative published statement under a claim of defamation if the plaintiff had a sullied reputation before the publishing of a challenged statement.³⁵ This prohibition is called the libel-proof plaintiff doctrine, which bars relief to such plaintiffs as a matter of law.³⁶ The libel-proof doctrine applies in two narrow contexts.³⁷ One is the incremental libel-proof doctrine, which bars libel awards when an article or broadcast contains highly damaging statements, but the plaintiff challenges only a minor assertion in the communication as false and defamatory.³⁸

3. *Online Defamation*

An Internet search for an uncommon name or for a small business will likely return a short list of results, increasing the chance that a negative comment stands out.³⁹ Defamation law is often difficult for courts to apply in Internet cases because of the

32. See *Bose Corp. v. Consumers Union of U.S. Inc.*, 466 U.S. 485, 513 (1984) (stating that erroneous statements are inevitable in free debate and must be protected if freedoms of expression are to have the breathing space they need to survive).

33. See *CPC Int'l v. Skippy Inc.*, 214 F.3d 456, 462–463 (4th Cir. 2000) (stating speech critical of a corporation is not a sufficient reason to enjoin the speech).

34. See, e.g., *Cent. Hudson*, 447 U.S. at 593 (stating false and misleading commercial speech is not entitled to First Amendment protection).

35. See Note, *The Libel-Proof Plaintiff Doctrine*, 98 HARV. L. REV. 1909, 1909 (1985) (stating that plaintiffs are barred from relief when statements do not damage their already sullied reputations).

36. See *id.* (defining libel-proof plaintiff doctrine).

37. See *id.* at 1910–11 (stating issue-specific context and plaintiff challenges only a minor assertion).

38. See *id.* at 1909 (explaining the limitations of claiming libel for some plaintiffs).

39. See generally Erik P. Lewis, Note, *Unmasking "Anon12345": Applying an Appropriate Standard when Private Citizens Seek the Identity of Anonymous Internet Defamation Defendants*, 2009 U. ILL. L. REV. 947 (2009) (showing that businesses as well as individuals are susceptible to online defamation).

vast amount of people involved in hosting sites and posting messages.⁴⁰ Under the Communications Decency Act, websites and ISP's are not liable for any material that was provided or created by another user, regardless of whether the material is protected under the Constitution.⁴¹

C. *Unmasking Standards and a Jurisprudential History*

When the identity of an individual is unknown in an online defamation case, plaintiff must file a "Doe" lawsuit without any named defendant, and then serve a subpoena on the Doe's Internet Service Provider to obtain information regarding the poster's identity.⁴² In determining whether or not to unveil an anonymous speaker's identity, most courts use frameworks that balance the poster's First Amendment right to remain anonymous against the plaintiff's right to assert its claim against a known, discernible target and obtain redress for wrongs ostensibly inflicted by that target.⁴³ Along with First Amendment balancing of the right to speak anonymously, a basic unmasking standard or statute will normally also have three other components: notice; an evidentiary showing on the merits of the claim; and the need for the identifying information.⁴⁴ The majority of variance amongst different states regarding unmasking standards often revolves around the latter two components.⁴⁵

1. *The Dendrite and Cahill Standards*

The prevailing view used amongst courts requires a plaintiff to put forth sufficient evidence to withstand a hypothetical summary judgment motion, seen most prominently in *Dendrite International*

40. See Allison E. Horton, Note, *Beyond Control?: The Rise and Fall of Defamation Regulation on the Internet*, 43 VAL. U. L. REV. 1265, 1296 (2009) (noting the complexity of applying libel law to the Internet).

41. See Communications Decency Act of 1996, Pub. L. 104-104, 110 Stat. 133 (codified at 47 U.S.C. §§ 230, 560-61).

42. See *id.*

43. See Robert D. Brownstone et al., 1 Data Sec. & Privacy Law § 9:170 (2014) (stating that a variety of different standards exist: summary judgment; balancing test; motion to dismiss).

44. See Matthew Mazzotta, Note, *Balancing Act: Finding Consensus on Standards For Unmasking Anonymous Internet Speakers*, 51 B.C. L. REV. 833, 848-57 (2010) (laying out the skeleton of a nondescript, standard unmasking statute).

45. See S. Elizabeth Malloy, *Anonymous Bloggers and Defamation: Balancing Interests on the Internet*, 84 WASH. U. L. REV. 1187, 1193 (2006) (claiming that too high a standard for plaintiffs to meet can fail to protect victims by failing to give them the necessary tools to bring their defamers to court).

*v. Doe No. 3*⁴⁶ and *Doe v. Cahill*.⁴⁷ In *Dendrite*, the court held that before obtaining an order requiring the disclosure of an anonymous defendant's identity, the plaintiff is required to: (1) undertake efforts to notify him/her of the subpoena and provide sufficient time for opposition to such application; (2) set forth the exact statements claimed to constitute the actionable speech; and (3) present sufficient evidence on each element of the cause of action to demonstrate a prima facie claim.⁴⁸ The court must then balance the defendant's First Amendment right of anonymous free speech against both the strength of plaintiff's prima facie case and the necessity for disclosure of the Doe defendant's identity.⁴⁹ Because of its strength, the *Dendrite* standard has become the leading standard in the United States, having already been adopted in over a dozen states.⁵⁰

In *Doe v. Cahill*, the Delaware Supreme Court modified the *Dendrite* standard, explaining that the plaintiff must make a prima facie case for each element of the defamation claim over which he has control.⁵¹ Essentially, the court disregarded the second and fourth standards from *Dendrite* and retained versions of the first and third: the plaintiff's efforts to notify the defendant must be reasonable and the plaintiff must also satisfy the summary judgment standard.⁵² Elements of both *Dendrite* and *Cahill* were used in *Independent Newspapers, Inc. v. Brodie*.⁵³ In this case, the

46. See 775 A.2d 756, 766 (N.J. Super. Ct. App. Div. 2001) (showing that a plaintiff needs to demonstrate a prima facie claim).

47. See 884 A.2d 451, 457 (Del. 2005) (holding that a defamation plaintiff must satisfy a "summary judgment" standard).

48. See *Dendrite*, 775 A.2d at 760–61.

49. See *id.* (stating that only if the plaintiff can make these three showings will the identity of the defendant be revealed).

50. See, e.g., *Mobilisa, Inc. v. Doe*, 170 P.3d 712 (Ariz. Ct. App. 2007) (discussing and ultimately adopting a *Dendrite*–*Cahill* hybrid standard); *Gallucci v. New Jersey On-Line LLC*; *Independent Newspapers v. Brodie*, 966 A.2d 432 (Md. 2009) (adopting the *Dendrite* standard). (New Jersey, Maryland, Delaware, Arizona, California, Indiana, New Hampshire, Texas, Pennsylvania, and the District of Columbia); see also *In re Indiana Newspapers*, 963 N.E.2d 534 (Ind. App. 2012) (adopting the modified *Dendrite* test); *Pilchesky 1 v. Gatelli*, 12 A.3d 430 (Pa. Super. 2011) (stating that the reviewing court must conduct the *Dendrite* balancing test); *Mortgage Specialists v. Implode-Explode Heavy Indus.*, 999 A.2d 184 (N.H. 2010) (ordering the trial court to apply *Dendrite* test); *Solers v. Doe*, 977 A.2d 941 (D.C. 2009) (stating that the summary judgment test satisfies the *Dendrite* balance test); *Krinsky v. Doe* 6, 72 Cal. Rptr.3d 231 (Ct. App. 2008) (ruling that a plaintiff to make a prima facie showing of the elements of libel in order to overcome a defendant's motion to quash a subpoena); *In re Does 1-10*, 242 S.W.3d 805 (Tex. App. 2007) (applying the balance test of *Dendrite*); *Doe v. Cahill*, 884 A.2d 451 (Del. 2005) (modifying the *Dendrite* standard).

51. See *Cahill*, 884 A.2d at 461 (showing a plaintiff must notify a defendant when practicable).

52. See *id.* at 457.

53. See *Indep. Newspapers, Inc. v. Brodie*, 966 A.2d at 450 (stating that the court retained the notification factor of *Dendrite* and the summary judgment

Maryland Court of Appeals used the *Dendrite* test in reversing the lower court, stating that a court should (1) require the plaintiff to identify the actionable statements, (2) determine whether a prima facie case for defamation has been made, and (3) balance the right to free speech against the strength of the prima facie case.⁵⁴

2. Virginia's Good Faith Standard and Section 8.01-407.1

Under the good-faith standard, a court will grant a subpoena ordering the unmasking of an anonymous poster if the pleadings or evidence satisfy the court, if the requesting party has a legitimate, good-faith belief that the speech was actionable, and if the requested information is necessary to advance the claim.⁵⁵ Following the good-faith test, section 8.01-405.1 requires a party seeking the identity of an anonymous poster to show either that the poster has made one or more communications that are or may be tortious or illegal, or that the party requesting the subpoena has a legitimate, good faith basis to contend that it is the victim of actionable conduct.⁵⁶ The statute also requires the party seeking the identity of the anonymous user to show that the anonymous user's identity is important, central, or directly and materially relevant to a claim or defense.⁵⁷

Under Virginia law, the elements of defamation are "(1) publication of (2) an actionable statement with (3) the requisite intent."⁵⁸ To be actionable, the statement must be both false and defamatory.⁵⁹ However, if the defamatory charge is true in substance, then slight inaccuracies of expression are immaterial.⁶⁰

D. Yelp v. Hadeed Carpet Cleaning

Yelp is a website that allows users to read and write local business reviews.⁶¹ To post, users must first register with the

standard of *Cahill*).

54. See *Cahill*, 884 A.2d at 457 (stating that all elements are required for disclosure of the anonymous defendant's identity).

55. See *Geloo v. Doe*, No. CL-2013-9646 2014 WL 2949508, at *5 (June 23, 2014) (stating that a plaintiff could satisfy section 8.01-407.1's "good faith" requirement simply by signing the complaint, meaning that all signed pleadings would override the First Amendment).

56. *Id.*

57. VA. CODE ANN. § 8.01-407.1(A)(1)(b) (2014).

58. See *Jordan v. Kollman*, 612 S.E.2d 203, 206 (Va. 2005).

59. See *M. Rosenberg & Sons v. Craft*, 29 S.E.2d 375, 378 (Va. 1944) (listing five distinct categories of words that are defamatory).

60. See *Jordan*, 612 S.E.2d at 207 (discussing that plaintiffs must show that a statement is substantively false).

61. See *Yelp v. Hadeed Carpet Cleaning*, 752 S.E.2d 554, 557 (Va. Ct. App. 2014) (discussing that contributors to Yelp have written over thirty-nine million

website, a process that requires users to provide a valid email address, choose a screen name to use when posting their reviews, and designate a zip code of their own choosing as their location.⁶² Yelp does not require users to identify or verify their legal names or place of residence.⁶³ However, when users post a review, Yelp records their Internet Protocol (IP) address and stores the IP address in its administrative database.⁶⁴ Before posting business reviews, Yelp users must agree to Yelp's Terms of Service and Content Guidelines (TOS) that require users to have actually been customers of the business for which they are posting a review.⁶⁵

Hadeed Carpet Cleaning is a Virginia company that specializes in cleaning consumer's carpets.⁶⁶ As of October 19, 2012, the business review website Yelp displayed seventy-five customer reviews of Hadeed Carpet Cleaning and eight reviews of Hadeed Carpet Cleaning's related company, Hadeed Oriental Rug Cleaning (collectively "Hadeed").⁶⁷ Common themes among the negative reviews were that Hadeed sometimes charged twice the advertised price, charged for work not performed, and that rugs were sometimes returned to the customer containing stains or defects.⁶⁸

Hadeed filed suit against the authors of seven specific reviews,⁶⁹ alleging it had tried to match the reviews with its customer database but could not find any record that the reviewers were actually Hadeed customers.⁷⁰ Hadeed alleged that the posts were false and defamatory. The only falsity alleged in the complaint is the allegation that the posters were not actual customers of Hadeed.⁷¹ Of the seven anonymous reviewers against whom Hadeed filed suit, six claimed that Hadeed overcharged and/or failed to

local reviews).

62. *See id.* (discussing the administrative procedures for creating a Yelp account).

63. *Id.*

64. *See* Jack Goldsmith & Tim Wu, *Who Controls the Internet? Illusions of a Borderless World* 31 (2006) (explaining that an IP address is a unique address assigned by an individual's Internet service provider).

65. *See Yelp*, 752 S.E.2d at 558 (stating that the TOS require users to base their reviews on their own personal experiences, and grants Yelp the authority to remove post that it deems violates its TOS).

66. *Id.*

67. *Id.*

68. *See id.* at 567 (discussing the allegations Hadeed claimed were false and defamatory).

69. *See* Complaint at 4, *Yelp v. Hadeed Carpet Cleaning*, 752 S.E.2d 554 (Va. Ct. App. 2014) (No. 0116-13-4) (showing that Hadeed sued users Bob G., Chris H., JS., YB., MP., Mike M., and Aris P.).

70. *See Yelp*, 752 S.E.2d at 567 (stating Hadeed determined that it simply had no record that the negative reviewers were ever actually Hadeed customers).

71. *See id.* at 558 (stating that Hadeed alleged that it tried to match the negative reviews with its customer database but could find no record that the negative reviewers were actually Hadeed customers).

honor a quoted price.⁷² Hadeed responded to several customer reviews by promising that the feedback would help the company improve.⁷³

Hadeed filed a complaint alleging defamation and conspiracy to defame, alleging that the Doe defendants falsely represented themselves as customers of Hadeed.⁷⁴ Hadeed alleged that it could prove a prima facie case of impact on business.⁷⁵ However, during oral arguments, Hadeed's counsel admitted that it could not say that the Doe defendants were not customers until Hadeed obtained their identities.⁷⁶ Hadeed issued a subpoena *duces tecum* to Yelp, under the authority of the First Amendment and the standards enumerated in section 8.01-407.1, seeking documents revealing information about the authors of each of the challenged reviews.⁷⁷

Yelp objected to the subpoena, contending that the First Amendment protected its users from being identified unless the plaintiff could present a prima facie case that their speech is tortious.⁷⁸ Yelp contended that the Virginia courts should adopt the First Amendment analysis adopted by state appellate courts throughout the country, following the lead of *Dendrite v. Doe*.⁷⁹

The trial court enforced the subpoena, holding that section 8.01-407.1 sets forth a standard whereby it is sufficient for a would-be plaintiff against Doe defendants to show that statements "may be tortious."⁸⁰ The court concluded that if the posters of the seven challenged Yelp reviews were not customers, the statements would be tortious, and consequently, Hadeed had met the constitutional and statutory standards sufficient to require Yelp to reveal the identities of the Does.⁸¹ Yelp argued that by holding it in contempt for failing to comply with the order, the court stripped the Doe

72. *See id.* at 567 (stating that negative reviewers Bob G., YB, and Aris P. use the theme that Hadeed doubled the price and negative reviewers Bob G., Chris H., MP., Mike M., and Aris P. criticize Hadeed's advertising).

73. *See, e.g.*, Brief for Yelp at 5, *Yelp v. Hadeed* 752 S.E.2d 554 Va. Ct. App. (2014) (No. 0116-13-4) (showing Hadeed apologized to MP, one of the reviewers it is suing).

74. *Yelp*, 752 S.E.2d at 558.

75. *See id.* at 566-67 (discussing how Hadeed had met the statutory requirements under Virginia law allowing disclosure of the defendants' identities).

76. *See id.* at 570 (quoting Hadeed's counsel stating, "I don't know whether that person is a customer or not, and we suspect not.").

77. *See id.* (stating the dissent maintains that the supporting material did not suffice to justify issuance of the subpoena).

78. *See id.* at 558 (stating Yelp contended that Hadeed had not complied with Virginia's procedure for subpoenas to identify anonymous Internet users).

79. *Id.* at 695; *see* 775 A.2d 756 (N.J. Super. App. Div. 2001) (requiring both a legal and an evidentiary showing that the suit has merit before a court may deny users the First Amendment right to speak anonymously).

80. *See id.* at 558 (finding compliance with the statute and the First Amendment, the trial court ruled to enforce the subpoena).

81. *See id.* at 566-67 (discussing that on appeal the court would review the trial court's decision for an abuse of discretion).

defendants of their First Amendment right to speak anonymously without requiring Hadeed to show that it had legally and factually sufficient claims against each defendant.⁸² The Court of Appeals affirmed the Circuit Court's holding by applying Virginia's unmasking standard in Code section 8.01-407.1.⁸³

In rejecting Yelp's argument, the court defined the reviews as commercial speech, therefore giving them less protection under the First Amendment.⁸⁴ The court held that the Doe's "First Amendment right to anonymity is subject to a substantial governmental interest in disclosure so long as disclosure advances that interest and goes no further than reasonably necessary."⁸⁵ The court also noted that a business' reputation is a "precious commodity."⁸⁶ The Virginia Court of Appeals rejected Yelp's position to apply a standard similar to the *Dendrite* standard, stating that in drafting section 8.01-407.1, the General Assembly considered persuasive authority from other states.⁸⁷ The court believed that by rejecting section 8.01-407.1 it would be forced to hold the provision unconstitutional.⁸⁸

III. ANALYSIS

A. The Court of Appeals Erred by Incorrectly Holding That Reviews and Criticism of Businesses Are Not Entitled to Full First Amendment Protection

Courts have held that less protection is offered to "commercial speech" as compared to literary, religious, or political speech.⁸⁹ By categorizing the anonymous Yelp reviews as commercial speech, the Virginia Court of Appeals wrongly subjected the Doe defendants to a lower standard of First Amendment protection.⁹⁰

82. *See id.* (stating that Yelp also argued that the trial court erred "by asserting subpoena jurisdiction over Yelp, which is a non-party, foreign corporation").

83. VA. CODE ANN. § 8.01-407.1 (2014).

84. *See Yelp*, 752 S.E.2d at 560–61 (distinguishing the level of protection the First Amendment accords to literary, religious, or political speech as compared to that accorded to commercial speech).

85. *See id.* at 561.

86. *Id.* at 561.

87. *See id.* at 566 (arguing that the Virginia Legislature had deliberately refused to require an evidentiary showing that the lawsuit has potential merit).

88. *See id.* at 562 (showing that Yelp relies on persuasive authorities from other states).

89. *See id.* at 560 (explaining that commercial speech is accord less First Amendment protection than other forms of speech).

90. *See id.*

1. *The Court Incorrectly Determined the Doe Defendant's Reviews to be Commercial Speech, Subjecting Them to a Lower Bar of First Amendment Protection*

While anonymous speech can be defamatory, it can only be punished in full accordance with First Amendment principles.⁹¹ The Supreme Court has also stated that while political speech may have unpleasant consequences, it is “accorded greater weight to the values of free speech than to the dangers of its misuse.”⁹² Nonetheless, the Court of Appeals incorrectly concluded that the anonymous Yelp reviews were entitled to less than full First Amendment protection because they constituted commercial speech.⁹³ This is a dangerous conclusion for all who use the Internet and consumers everywhere, as millions of people rely on online reviews in order to make decisions regarding what products and services they purchase, where to travel, and many other choices.⁹⁴ Reviews by users can reveal problems and defects with products, warn potential consumers of a product or service’s risks, and in some cases, even lead companies to remedy the problem and do right by the consumer.⁹⁵

The Court of Appeals misapplied the commercial speech doctrine in reaching its decision.⁹⁶ In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the Supreme Court held that expressions that were solely related to the economic interest are offered less protection under the First Amendment.⁹⁷ However, the Court made clear that this commercial speech is an extremely narrow category and was limited only to advertising that did no more than propose a commercial

91. See *id.* at 560 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 302 (1964)) (stating that defamation is not immune from constitutional limitations and must be measured by standards that satisfy the First Amendment).

92. See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995) (citing *Abrams v. United States*, 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting)).

93. See *Yelp*, 752 S.E.2d at 560 (stating the Court finds it difficult to conceive these reviews as anything other than commercial speech).

94. See Susannah Fox & Maeve Duggan, *supra* note 6 (reporting that 80 percent of Internet users consult online reviews).

95. See David Kirkpatrick, *Why There’s No Escaping the Blog*, FORTUNE (Jan. 10, 2005), http://archive.fortune.com/magazines/fortune/fortune_archive/2005/01/10/8230982/index.htm (reporting that an anonymous review claiming a flaw in a bike lock caused the company to replace approximately 100,000 locks for free).

96. See *Yelp*, 752 S.E.2d at 560 (holding that the First Amendment affords protection to literary, religious, or political speech as compared to that afforded to commercial speech, and that the Doe’s anonymous reviews were commercial speech).

97. See 447 U.S. 557, 561, 563 (1980) (stating that speech solely related to the economic interests of the speaker and its audience are afforded less protection).

transaction.⁹⁸

Applying the factors laid out by the Fourth Circuit, the anonymous Yelp reviews at the center of this case are not commercial speech.⁹⁹ First and most importantly, the reviews at issue propose no commercial transaction at all; the Does only complained of problems they encountered during their transactions with Hadeed.¹⁰⁰ These highly critical reviews also cannot be considered advertisements by any stretch of the word.¹⁰¹ Further, like the vast majority of people who write online reviews, users on Yelp derive no economic benefit from any of their reviews left on the site.¹⁰² The motivations of Yelp users to post reviews are varied, such as sharing a personal experience or one's personal opinion about a business.¹⁰³ Therefore, the motivations of the anonymous reviewers were unlike the motivations of the defendant in *Lefkoe*, whose letter was solely related to the economic interest of the speaker and its audience.¹⁰⁴

Lastly, while the reviews themselves do refer to a specific service, Hadeed Carpet Cleaning, this alone is not enough to equate the reviews to commercial speech.¹⁰⁵ If this factor alone were sufficient to render something commercial speech, commercial speech would subsume all criticism.¹⁰⁶ If a Yelp review were

98. *See id.* at 562 (stating that government has complete power to suppress or regulate speech that “only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information”).

99. *See* Greater Balt. Ctr. for Pregnancy Concerns, v. Mayor & City Council of Balt., 721 F.3d 264, 285 (4th Cir. 2013) (citing *Bolger v. Young Drug Prods.*, 463 U.S. 60, 66 (1983)) (stating that whether speech is an advertisement, whether it refers to a specific product or service, and whether the speaker has an economic motivation all affect whether speech is commercial).

100. *See Cent. Hudson*, 447 U.S. at 580 (stating examples of speech proposing a commercial transaction as a salesman's solicitation, a broker's offer, and a manufacturer's publication of a price list or the terms of his standard warranty).

101. *See Advertising*, BLACK'S LAW DICTIONARY (9th ed. 2009), available at Westlaw BLACK'S LAW DICTIONARY (the reviews in question were critical statements made about Hadeed and did not draw “the public's attention to something to promote its sale.”).

102. *See* Yelp Terms of Service § 6(A)(i), <http://www.yelp.com/static?p=tos> (last visited Nov. 27, 2012) (banning “compensating someone or being compensated to write or remove a review”).

103. *See Yelp*, 752 S.E.2d at 557, 568 (describing reasons for posting a Yelp review).

104. *See Lefkoe v. Jos. A. Bank Clothiers, Inc.*, 577 F.3d 240, 248 (4th Cir. 2009) (stating that the letter did no more than request that the committee share the letter with the company's auditors, and held that this was solely related to the economic interest of the speaker and its audience).

105. *See Bose Corp. v. Consumers Union*, 466 U.S. 485, 513–14 (1984) (applying full First Amendment protection to review of a consumer product).

106. *See id.* at 513 (stating that erroneous statement is inevitable in free debate and must be protected if freedoms of expression are to have the breathing space that they need to survive).

considered to be solely economic in nature purely because it refers to a business transaction, trademark owners could prevent the use of their marks in noncommercial context that they found to be offensive.¹⁰⁷ Thus, they could shield themselves from criticism by forbidding the use of their name in critical commentaries.¹⁰⁸

As previously stated, compelled identification of anonymous persons encroaches on the First Amendment right of anonymous speakers to remain anonymous; justification for infringing that right requires proof of a compelling interest; and beyond that, the restriction must be narrowly tailored to serve that interest.¹⁰⁹ Thus, courts have had to decide whether the mere filing of a complaint creates a compelling government interest or whether more is required.¹¹⁰ By erroneously assuming that the Yelp reviews were commercial speech, the Court of Appeals incorrectly subjected the Does to less protection against the subpoena than they would have been offered had their reviews been seen as any other type of speech.¹¹¹ And by giving this lesser protection to the Does, Hadeed avoided the need to show a compelling interest to justify court-ordered identification.¹¹²

*B. The Court Erred in Its Decision Because It
Incorrectly Held That Hadeed Made the Proper
Showing Required Before the Identification of John
Doe Speakers May Be Ordered in Claim of
Defamation*

Under Virginia law, the elements of libel are “(1) publication of (2) an actionable statement with (3) the requisite intent To be actionable, the statement must be both false and defamatory.”¹¹³ However, in *Yelp v. Hadeed*, Hadeed’s claim for defamation is seriously flawed. He does not allege a valid claim of defamation against the authors of the seven anonymous reviews, nor does the complaint produce sufficient evidence supporting each element of

107. See *CPC Int’l v. Skippy Inc.*, 214 F.3d 456, 462–463 (4th Cir. 2000) (stating that criticism of a corporation and its business practices is alone not a sufficient reason to enjoin speech).

108. *Id.*

109. See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (explaining that when a law burdens core political speech, it is upheld only if it is narrowly tailored to serve an overriding state interest).

110. See *id.* (applying “extracting scrutiny”).

111. See *Yelp v. Hadeed Carpet Cleaning*, 752 S.E.2d 554, 561–62 (Va. Ct. App. 2014) (arguing that the Does’ speech was commercial and therefore enjoyed limited protection).

112. See *id.* at 561 (citing *Lefkoe*, 577 F.3d at 248–49) (stating that commercial speech is subject to modes of regulation that might be impermissible in the realm of noncommercial expression).

113. See *Jordan v. Kollman*, 269 Va. 569, 575 (2005).

defamation to show that it has a claim for relief against the defendants.¹¹⁴

1. *Because Hadeed Does Not Allege Any Substantive Problems, Hadeed Does Not Have a Valid Claim of Defamation*

The elements of defamation in Virginia require the publication of an actionable statement with the requisite intent.¹¹⁵ However, “slight inaccuracies of expression are immaterial provided the defamatory charge is true in substance, and it is sufficient to show that the imputation is substantially true.”¹¹⁶ Therefore, as long as the essence of a statement is substantially true, insignificant inaccuracies will not give rise to a defamation claim.¹¹⁷ While claiming that Hadeed committed certain wrongdoings could be defamatory, simply identifying oneself as a former customer of Hadeed is immaterial compared to the reviewer’s substantive claims.¹¹⁸ Therefore, because this is the only allegation that Hadeed made, the Court should not have allowed the insufficiently pled defamation claim to persist.¹¹⁹

Hadeed’s failure to allege that accusations of overcharging are false undercuts his defamation claims because tortious communications must be false.¹²⁰ Six of the seven online communications claimed Hadeed overcharged and/or failed to honor a quoted price.¹²¹ However, Hadeed never indicated within his complaint that the Doe defendants made false statements.¹²²

114. *See Yelp*, 752 S.E.2d at 558 (showing that Hadeed alleged that the negative reviewers were not actual customers).

115. *See Jordan*, 269 Va. at 577 (stating the plaintiff “must demonstrate by clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement”).

116. *See id.* at 576 (quoting *Saleeby v. Free Press*, 197 Va. 761, 763 (1956)).

117. *See AIDS Counseling & Testing Ctrs v. Grp. W Television*, 903 F.2d 1000, 1004 (4th Cir. 1990) (stating that although the defendant’s statements were false, they did not cause the story to produce a different effect on the audience than would have been produced had the truth of the matter been spoken); *see also Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1092 (4th Cir. 1993) (stating that a publication’s false statement and defamatory sting must coincide).

118. *See Saleeby*, 197 Va. at 763 (explaining that if the defamatory charge is true in substance, then any slight misrepresentations are immaterial).

119. *See id.* (noting that Hadeed did not refute that the defamatory charges were not true in substance).

120. *See Tharpe v. Saunders*, 737 S.E.2d 890, 892 (Va. 2013) (stating that “whether the quoted statement was made or not is certainly factual subject to being disproved,” but “the basis for the claim of defamation is not dependent upon that fact”).

121. *See Yelp v. Hadeed Carpet Cleaning*, 752 S.E.2d at 570 (stating that one of the commenters claimed Hadeed had “shrunk” his rugs).

122. *See id.* (showing that in a few cases, Hadeed had apologized and

Moreover, Hadeed chose not to sue several other commenters whose reviews shared the same theme of the six who claimed that Hadeed overcharged and/or failed to honor the quoted price.¹²³ Hadeed posted responses to several posts that either ignore the accusations about overcharging and misleading advertising, or acknowledge the charge but apologize and promise to improve in future dealings.¹²⁴ Hadeed instead claimed that the Doe defendants may not have been customers, and if they were not, the substantive statements may be tortious.¹²⁵ By not including additional negative reviewers in his lawsuit, it is likely Hadeed was able to match the negative reviews to customers in the company's database during its independent investigation.¹²⁶ Consequently, even if the seven Doe defendants were not actual Hadeed customers, the descriptions of false advertising prices and price charges would be substantially true; Hadeed did not file suit against other verified customers who made the same allegations, and hence these allegations are not the proper subject of a libel claim.¹²⁷

The only specific allegation of falsity made by Hadeed is that the seven Doe defendants were not in fact customers of Hadeed.¹²⁸ This allegation alone does not state a valid claim of defamation under Virginia law,¹²⁹ especially when Hadeed concedes that it is uncertain whether the Yelp reviewers were customers or not.¹³⁰ The dissenting opinion seems to agree, suggesting that Hadeed's argument is self-serving and proceeds from a premise the argument is supposed to prove.¹³¹

promised to improve in future dealings).

123. Complaint at 4, *Yelp v. Hadeed Carpet Cleaning*, 752 S.E.2d 554 (Va. Ct. App. 2014) (No. 0116-13-4).

124. *See id.* (acknowledging that Hadeed responded to each negative review with "Hadeed Carpet appreciates your feedback; we wish to address your concerns but need your complete name and/or invoice number to contact you. We stand behind our work, and are always seeking to improve our communication and customer service.")

125. *See id.* (stating that nowhere in this case has Hadeed claimed that any of the substantive statements are false).

126. *See Yelp*, 752 S.E.2d at 570 (stating that Hadeed sued only those reviewers who he could not find record of in the customer database).

127. *See Saleeby*, 197 Va. at 763 (stating that a defamation claim is not actionable if an accusation is substantially true).

128. *See Yelp*, 752 S.E.2d at 570 (stating that Hadeed maintained the Doe reviewers may not have been customers, and if they were not, the substantive statements may be tortious).

129. *See Jordan*, 269 Va. at 575 (establishing that a statement must be both false and defamatory to be actionable).

130. *See Yelp*, 752 S.E.2d at 570 (admitting during oral argument that it cannot say the John Doe defendants are not customers until it obtains their identities).

131. *See id.* (Haley, J., dissenting) (quoting *Turpin v. Branaman*, 58 S.E.2d 63, 67 (1950)) (stating, "If Hadeed were an individual, he would be attempting to lift himself by his own bootstraps.").

2. *Because Hadeed Presented No Evidence That the Doe Defendants Made Any False Statements, Hadeed Does Not Have a Valid Claim of Defamation*

Under Virginia law, unless a plaintiff produces sufficient evidence supporting each element of its cause of action to show that it has a plausible chance of winning a lawsuit against a defendant, no person should be subjected to compulsory identification via a subpoena.¹³² This requirement stops a plaintiff from being able to identify his critics simply by filing a facially adequate complaint, such as Hadeed claiming that they needed to identify the Doe defendants simply to proceed with their case.¹³³ This requirement has been followed by a majority of appellate and state courts that has addressed the standard for identifying anonymous Internet speakers.¹³⁴

To address this potential abuse in unmasking cases, courts often require a party-seeking discovery of information protected by the First Amendment to show that there is reason to believe that the information sought will, in fact, help its case.¹³⁵ By requiring this, courts ensure that plaintiffs meet a standard of creating genuine issues of material fact on all issues in the case before they are allowed to obtain the requested identities.¹³⁶ In cases that feature valid defamation claims, the plaintiff is likely to have ample means of proving that a statement is false and that it caused the plaintiff harm.¹³⁷

132. See VA. CODE ANN. § 8.01–407.1(A)(1)(a)-(c)(2014) (defining the “supporting material” to be attached to the request for an unmasking subpoena *duces tecum*).

133. See *Yelp*, 752 S.E.2d at 556 (displaying Hadeed’s claim that it needed the identities of the Doe defendants to determine if they were actual customers).

134. See, e.g., *Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432, 441–42 (Md. 2009) (explaining that extrinsic facts must be alleged in the complaint to establish the defamatory character of the words or conduct); *Krinsky v. Doe 6*, 159 Cal. App. 4th 1154, 1172 (2008) (requiring a prima facie showing of elements of alleged torts of defamation); *Doe v. Cahill*, 884 A.2d 451, 460 (Del. 2005) (requiring plaintiffs to support their claim with facts sufficient to defeat a summary judgment motion); *Dendrite Int’l, Inc. v. Doe*, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001) (requiring that this requirement establishes that an action can withstand a motion to dismiss).

135. See *In re Petroleum Prods. Antitrust Litig.*, 680 F.2d 5, 6–9 (2d Cir. 1982) (denying compelled disclosure of press sources); *Richards of Rockford v. PGE*, 71 F.R.D. 388, 390–391 (N.D. Cal. 1976) (denying compelled disclosure of academic sources); cf. *Schultz v Reader’s Digest*, 468 F. Supp. 551, 566–567 (E.D. Mich. 1979) (denying compelled disclosure of magazine source).

136. See *Cervantes v. Time*, 464 F.2d 986, 994 (8th Cir. 1972) (stating that mere speculation and conjecture are not sufficient).

137. See generally *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) (involving a man who was accused of being a distributor of obscene materials on a radio broadcast after he was arrested. He won his defamation case because the charges were dropped and he was able to prove that he was not with police records).

In *Yelp*, Hadeed claimed that it could show a prima facie case of impact on business.¹³⁸ However, Hadeed's complaint fails because it has offered no evidence that anything said in the seven negative reviews is false or has caused harm to Hadeed's reputation.¹³⁹ Because Hadeed's complaint fails to allege what steps it undertook in its independent investigation, Hadeed has not attempted to prove that the anonymous reviewers are not from actual customers.¹⁴⁰ Further, Hadeed's complaint suggests that it was an absence of information, rather than affirmative knowledge, that led Hadeed to conclude that these specific anonymous reviewers were not previous customers.¹⁴¹

Additionally, the trial court had no basis for determining that Hadeed had a legitimate belief that the specific reviewers it chose to sue were not actually customers, given the absence of any specific details of how Hadeed formulated that belief in the first place.¹⁴² Hadeed alleged that it reviewed its "customer database," but it offered no explanation as to what information the database contained that could allow it to match up with the reviews. This is especially true because Yelp does not require reviewers to use their real name or real location.¹⁴³ Because this is the claim of falsity upon which Hadeed has chosen to rest its entire defamation claim, Hadeed should have been required to at the very least present evidence supporting that its customer database contains sufficient information and detail to support an inference that the individuals who made the claims were not actually customers.¹⁴⁴ Hadeed is not required to prove that the Doe defendants were not customers; it only needs to present evidence sufficient to support an inference that the Doe defendants were not customers.¹⁴⁵ With the lack of evidence presented, the trial court should not have considered or determined whether there existed a sufficient basis for overcoming the Doe defendant's First Amendment right to speak

138. *See Yelp*, 752 S.E.2d at 558 (stating that the negative reviews claiming "shoddy service" affected their reputation and therefore future business).

139. *See id.* at 570 (Haley, J., dissenting) (stating that at no point does Hadeed claim any of the substantive statements are false).

140. *See id.* (stating that Hadeed did not know if the review came from a customer or not).

141. *See* App. 4 ¶ 17 (Complaint stating that "not only was Hadeed Carpet unable to find any evidence that the negative reviewers were ever Hadeed Carpet customers").

142. *See* VA. CODE ANN. § 8.01-407.1 (2014) (stating that a plaintiff needs a legitimate, good faith basis for the belief that the conduct is tortious).

143. *See Yelp*, 752 S.E.2d at 557 (showing that Yelp does not require users to use their real name or location).

144. *See id.* at 558, 570 (stating that the only falsity alleged in the complaint is the assertion that the posters were not actual customers of Hadeed, and that Hadeed admitted it could not say that the Doe defendants were not customers until Hadeed obtains their identities).

145. *See id.* at 558 (explaining that § 8.01-407.1's fourth prong only requires a plaintiff to show that statements "may be tortious").

anonymously.¹⁴⁶

Further, Hadeed's complaint is not valid because it fails to allege material falsity of the negative anonymous Yelp reviews.¹⁴⁷ The First Amendment requires a defamation plaintiff to prove not only literal falsity but also material falsity.¹⁴⁸ In *Air Wisconsin Airlines Corp. v. Hoeper*, the Supreme Court explained that the falsity of a statement is only material to a defamation claim if the statement affects the subject's reputation in the community.¹⁴⁹ However, in *Yelp*, Hadeed at no point denies that the negative anonymous claims made against the business were false, nor does it claim that the reviews affected its reputation in the community.¹⁵⁰ The only claim made by Hadeed is that the anonymous reviewers were not actual customers, and because of that, the reviews were false; whether or not the anonymous reviewers were actual customers of Hadeed has no effect at all on Hadeed's reputation in the community.¹⁵¹ Only the statements that the reviews made could affect Hadeed's reputation in the community. However, Hadeed never alleged that the challenged reviews damaged its business reputation within the community.¹⁵²

3. *Hadeed's Claims Are Deficient Under the Related Doctrine That a Libel-Proof Plaintiff Cannot Sue for Defamation because Other Customers Had Previously Stated the Same Complaints Made By the Doe Defendants*

Under the libel-proof plaintiff doctrine, an alleged victim of defamation can obtain damages only for incremental harm done to his reputation by the defamation.¹⁵³ If an alleged defamation victim's reputation has already been destroyed in the same forum where Doe defendants have expressed their views about the alleged

146. *See id.* (showing the trial court blindly accepted that Hadeed had a good faith basis for believing the Doe defendants were not customers).

147. *See id.* (showing that Hadeed alleged that the negative reviewers were not actual customers).

148. *See Air Wis. Airlines Corp. v. Hoeper*, 134 S. Ct. 852, 856 (2014) (explaining that a materially false statement is one that would have a different effect on the mind of the reader or listener from that which the truth would have produced); *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991).

149. *See Air*, 134 S. Ct. 852 at 863 (holding that the reputational harm caused by a false statement is its effect on a reader's or listener's mind).

150. *See Yelp*, 752 S.E.2d at 570 (stating that nowhere does Hadeed claim any of the substantive statements are false).

151. *See Saleeby v. Free Press*, 197 Va. 761, 763 (1956) (explaining that if the defamatory charge is true in substance, then any slight misrepresentations are immaterial).

152. *See Yelp*, 752 S.E.2d at 558 (showing that Hadeed alleged only that the negative reviewers were not actual customers).

153. *See Note, The Libel-Proof Plaintiff Doctrine*, 98 HARV. L. REV. 1909, 1921–22 (1985) (explaining different types of libel-proof plaintiffs).

defamation victim, then the alleged defamation victim has no remedy.¹⁵⁴

The fact that numerous other Yelp reviews which accuse Hadeed of false advertisement and overcharging are uncontested by Hadeed shows that even if the anonymous reviewers did not personally have the negative experiences that they describe, it would be implausible for Hadeed to allege that the presence of a few more negative reviews would cause Hadeed any incremental harm.¹⁵⁵ The strongest cases for applying the issue-specific branch of the libel-proof plaintiff doctrine arise when the libel plaintiff has been “criminally convicted for behavior similar or identical to that described in the challenged communication.”¹⁵⁶ While the allegations being made on Yelp against Hadeed are nowhere near criminal, the same logic follows. Therefore, if the reviews being made against Hadeed turn out to be true, then Hadeed’s reputation would have already been ruined, making him a libel-proof plaintiff.¹⁵⁷

The incremental libel-proof doctrine, which bars libel awards when an article or broadcast contains highly damaging statements, but the plaintiff challenges only a minor assertion in the communication as false and defamatory, could also apply to Hadeed.¹⁵⁸ While the anonymous reviewers made statements about Hadeed’s misleading ads and overcharging, Hadeed fails to challenge any of this and only asserts that the reviewers were not actually Hadeed customers.¹⁵⁹

*C. The Court Erred in Its Decision Because It
Misapplied Statute by Failing to Interpret Statute as
Vigorously as Required by the First Amendment*

The Virginia Legislature enacted section 8.01-407.1 to guide courts on how to decide when to allow compelled disclosure of

154. See *Austin v. Am. Ass’n of Neurological Surgeons*, 253 F.3d 967, 974 (7th Cir. 2001) (stating that if a plaintiff’s reputation has already been destroyed by truthful information, he has no remedy).

155. See, e.g., *Cerasani v. Sony Corp.*, 991 F. Supp. 343, 354–355 (S.D.N.Y. 1998) (taking judicial notice of Cerasani’s criminal record).

156. See *The Libel-Proof Plaintiff Doctrine*, *supra* note 152, at 1921–22 (stating that “[c]riminal convictions represent the paradigm of full and fair litigation, and publicly reported convictions inevitably damage a prospective libel plaintiff’s reputation severely”).

157. See *Yelp*, 752 S.E.2d at 570 (showing that a common theme of Yelp complaints for Hadeed’s business relate to false advertisement and overcharging, inferring that these allegations could be real).

158. See *id.*

159. See Brief for Yelp at 5, *Yelp v. Hadeed* 752 S.E.2d 554 Va. Ct. App. (2014) (No. 0116-13-4) (discussing, for example, that Hadeed never denied that it sometimes charges twice the advertised price).

anonymous posters.¹⁶⁰ In its ruling, however, the court of appeals failed to recognize multiple indicators in the language of section 8.01-407.1 that require a greater showing of tortious conduct before identifying an anonymous speaker.¹⁶¹ As the Supreme Court has shown in *McIntyre v. Ohio Elections Commission* and *Talley v. California*, the First Amendment has long protected an individual's right to speak anonymously, and a strong interpretation of section 8.01-407.1 aligns with that right.¹⁶² According to section 8.01-407.1, a party is required to submit "supporting material" that supports its unmasking request, requires a party asserting a claim to have a "legitimate, good faith basis," and contains inherent balancing tests.¹⁶³ In its ruling, the Virginia Court of Appeals failed to apply these components of the statute.

1. *The Court Erred in Its Application of Section 8.01-407.1's "Supporting Material" Requirement, which Ensures a Heightened Evidentiary Standard as Required by the First Amendment*

The language of section 8.01-407.1 has several provisions that indicate a heightened evidentiary burden beyond a mere declaration of a good faith belief that tortious conduct occurred. Instead, the provisions require a party seeking a subpoena to submit "supporting material showing" that the communications may be tortious or that the party has a "legitimate, good faith basis" to assert a claim.¹⁶⁴ A Virginia court has also stated that a plaintiff merely stating that they believe that the speech in question is tortious is insufficient without any supporting evidence.¹⁶⁵

The Court of Appeals acknowledges that a plaintiff must submit evidence to satisfy the first subpart of section 8.01-407.1(A)(1)(a), stating that there is no need to analyze the second subpart of the prong if there is direct evidence demonstrating that the communications are tortious, and the plaintiff provides that

160. See *Yelp*, 752 S.E.2d at 562 (stating that Virginia is one of the many jurisdictions to develop its own unmasking standard).

161. See VA. CODE ANN. § 8-01-407.1 (requiring supporting material and a "legitimate, good faith basis" for asserting a claim).

162. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341 (1995) (stating that excluding anonymous publication from the marketplace of ideas is not valid); *Talley v. California*, 362 U.S. 60, 64–65 (1960) (invalidating a Los Angeles ordinance that prohibited the distribution of all anonymous pamphlets).

163. See § 8.01-407.1(A)(1)(a) (requiring supporting material and a "legitimate, good faith basis" for asserting a claim).

164. *Id.*

165. See *Geloo v. Doe*, 140242 2014 WL 2949508 at *5 (Va. Cir. Ct. June 23, 2014) (citing *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 752 S.E.2d 554, 562 (Va. Ct. App. 2014)) (stating that a plaintiff could satisfy § 8-01-407.1 "good faith" requirement simply by signing the complaint, meaning that all signed pleadings would override the First Amendment).

evidence to the circuit court.¹⁶⁶ However, the Court failed to require Hadeed to produce sufficient evidence in support of section 8.01-407.1's second subpart, which requires a demonstration of a "legitimate, good faith basis" for asserting a tort claim.¹⁶⁷ Hadeed at no point offered any evidence suggesting that the substance of John Doe defendants' reviews were false, and its belief that the reviewers were not actual customers of Hadeed was founded on pure speculation.¹⁶⁸

2. *The Court Failed to Examine the Strength of Hadeed's Claim to Ensure There Was a Legitimate, Good Faith Basis for Asserting a Claim*

In its opinion, the Court consistently paraphrases section 8.01-407.1 as requiring the plaintiff to show it has "a legitimate, good faith basis for *its belief* that the conduct is tortious."¹⁶⁹ However, the language of section 8.01-407.1 requires a showing that the plaintiff "has a legitimate, good faith basis *to contend* that such party is victim of conduct actionable in the jurisdiction where the suit was filed."¹⁷⁰ The Court's substitution of the statute's language with its own is inaccurate, and the court should be looking not just at what the plaintiff believes to be true, but also whether the plaintiff has a legitimate basis for asserting its claim.¹⁷¹ In deciding that because Hadeed attempted to determine whether the Doe defendants were actually customers by comparing its customer database to the Yelp reviews, the Court of Appeals incorrectly held that Hadeed demonstrated a legitimate, good faith belief that the reviews were defamatory.¹⁷² At no point did the court ever give any cognizable regard to the word "legitimate."¹⁷³ It is not enough for the court to

166. *Yelp v. Hadeed Carpet Cleaning*, 752 S.E.2d 554, 564 (Va. Ct. App. 2014); *see also Gelo*, 2014 WL 2949508 at *2 (stating that the first subpart requires the court to look at whether there is direct evidence demonstrating that the communications are tortious or not).

167. *See* § 8.01-407.1(A)(1)(a).

168. *See Yelp*, 752 S.E.2d at 570 (Haley, J., dissenting) (arguing that Hadeed did not claim that any of the substantive statements were false and that the statute requires the submission of evidence beyond merely alleging the commenters were not customers because they were unidentifiable in their database).

169. *See id.* at 564–67 (emphasis added) (stating that communications made by the anonymous communicator are or may be tortious or illegal).

170. § 8.01-407.1(A)(1)(a) (emphasis added).

171. *See* Contend Definition, *Merriam-Webster*, <http://www.merriam-webster.com/dictionary/contend> (last visited Aug. 17, 2014) (defining "contend" as "to argue or state something in a strong and definite way" and "maintain; assert").

172. *See Yelp*, 752 S.E.2d at 567 (declaring the second subpart had been met because Hadeed established that it had no record of having provided services to the posters).

173. *See generally id.* (showing that nowhere in the opinion does the court

find that Hadeed had a good faith belief that the reviewers were not customers;¹⁷⁴ the court must also determine whether this belief is legitimate based on sufficient evidence, which was not presented by Hadeed in this case.¹⁷⁵ Also, a plain reading of the statute would require a court to look at whether a party has a “legitimate, good faith basis to contend,” meaning, to assert, a cause of action; not the word belief.¹⁷⁶ When read this way, it is necessary for the Court of Appeals to look at the merits of Hadeed’s claim to determine whether the party has a legitimate cause of action to unmask the Doe defendants, which the court did not.¹⁷⁷

3. *The Court Failed to Balance an Anonymous Speaker’s First Amendment Rights Against the Plaintiff’s Interest in Unmasking Speakers*

While the Court of Appeals noted that within § 8.01-407.1 there is an inherent balancing test of an anonymous speaker’s First Amendment rights against the plaintiff’s interest in unmasking the anonymous speakers within § 8.01-407.1, the court does not give the appropriate weight to the First Amendment interests at stake.¹⁷⁸ The court first acknowledges that in regards to the second subpart of § 8.01-407.1, there is no dispute that the Doe defendants “have a constitutional right to speak anonymously over the Internet” which must be balanced against Hadeed’s “right to protect its reputation.”¹⁷⁹ However, nowhere in its opinion does the court conduct a balancing analysis.¹⁸⁰

Second, the Court of Appeals noted that in order for Hadeed to satisfy § 8.01-407.1’s fourth prong,¹⁸¹ “a circuit court must

define legitimate).

174. *See* § 8.01-407.1(A)(1)(a) (requiring “that the party requesting the subpoena has a legitimate, good faith basis to contend that such party is the victim of” actionable conduct).

175. *See Yelp*, 752 S.E.2d at 570 (Haley, J., dissenting) (stating Hadeed’s belief that the reviewers were not actual customers of Hadeed are founded on pure speculation).

176. *See* § 8.01-407.1(A)(1)(a); Contend Definition, *Merriam-Webster*, *supra* note 170.

177. *See Yelp*, 752 S.E.2d at 570 (Haley, J., dissenting) (asserting that Hadeed’s claim that the Doe defendants were not customers had no legitimacy).

178. *See id.* at 566 (acknowledging that the Doe defendant’s rights must be balanced against Hadeed’s rights).

179. *See id.* (laying out the balancing test to be implemented); *see also* *Geloo v. Doe*, 140242 2014 WL 2949508 at *5 (Va. Cir. Ct. June 23, 2014) (stating that the court must balance a defendant’s constitutional right to speak anonymously over the Internet with a plaintiff’s right to protect her reputation).

180. *See generally Yelp*, 752 S.E.2d 554 (showing how the court ultimately failed to implement the balancing test discussed).

181. *See* § 8.01-407.1(A)(1)(c) (requiring the plaintiff to show that the identity of the Doe defendants is important, is centrally needed, relates to a core claim, or is directly and materially relevant).

necessarily balance the interests of the anonymous communicator against the interests of the plaintiff in discovering the identity of the anonymous communicator.”¹⁸² However, the court does not make this analysis, stating:

Turning to the fourth prong, we find that the identity of the Doe defendants is important, is centrally needed to advance the claim, is related to the claim or defense, or is directly relevant to the claim or defense. Without the identity of the Doe defendants, Hadeed cannot move forward with its defamation lawsuit. There is no other option. The identity of the Doe defendants is not only important, it is necessary.¹⁸³

The court disregards the defendant’s First Amendment rights by incorrectly concluding that the Yelp reviews were commercial speech, subjecting the reviews to a lower bar of First Amendment protection.¹⁸⁴ The Court of Appeals, while acknowledging that the rights must be balanced, gives zero weight to the Doe defendant’s First Amendment rights.¹⁸⁵

D. The Virginia Court of Appeals’ Reasoning For Not Rejecting Section 8.01-407.1 Was Erroneous Because It Misinterpreted the Legislatures Intent

In its ruling, the Court of Appeals relied heavily on the argument that the Virginia Legislature had deliberately refused to follow the example of other states that require an evidentiary showing that the lawsuit has potential merit.¹⁸⁶ The court declined to declare § 8.01-407.1 unconstitutional, stating that they were “reluctant to declare legislative acts unconstitutional, and will do so only when the infirmity is clear, palpable, and practically free from doubt.”¹⁸⁷ However, the Courts argument for not rejecting § 8.01-407.1 contains several flaws.

182. *Yelp*, 752 S.E.2d at 565.

183. *Id.* at 568.

184. *See supra* Part III(A)(1) (discussing how commercial speech is subject to lesser First Amendment protection).

185. *See Yelp*, 752 S.E.2d at 568 (showing that the court does not balance the right of the anonymous speaker).

186. *See id.* at 566 (stating that in drafting § 8.01-407.1, the General Assembly considered persuasive authority from other states and made the policy decision to include or exclude factors that other states use in their unmasking standards).

187. *See id.* at 565 (stating that there is a strong presumption in favor of the constitutionality of statutes).

1. *The Court Was Incorrect in Ruling that It Could Not Apply a Different Unmasking Standard Without Finding the Virginia Statute Unconstitutional*

In *Yelp*, the Court of Appeals took the opinion that by embracing Yelp's position to apply a summary judgment standard similar to those laid out in both *Dendrite* and *Cahill*, it would be forced to hold § 8.01-407.1 unconstitutional.¹⁸⁸ However, there are many situations in which a state statute, a federal statute, and the Constitution provide alternate bases for individuals to assert rights against government action. For example, when a court considers a subpoena seeking to identify a reporter's sources or outtakes, and the court decides first whether the statutory shield applies, and then decides whether the constitutional shield applies.¹⁸⁹ Other courts generally do not feel obligated to declare state shield laws unconstitutional just because the First Amendment provides more protection.¹⁹⁰ They simply see them as offering alternate paths to relief.¹⁹¹

2. *The Court of Appeals Was Incorrect in Deciding That the Adoption of § 8.01-407.1 Represented a Policy Choice to Reject Persuasive Authority from Other States*

The Court of Appeals incorrectly held that it could not follow a constitutional analysis that went beyond § 8.01-407.1 without rejecting what it assumed to have been the legislative policy choice to reject the approach taken by courts in several other states, such as the New Jersey Appellate Division in *Dendrite*.¹⁹² However, the report itself does not support the notion that its consideration by the Legislature implies a rejection of the *Dendrite* standard for several reasons. First, the report was completed in 2001, several

188. See *id.* at 562 (showing that by arguing for a required showing of merit on both law and facts before a subpoena *duces tecum* to identify an anonymous speaker, Yelp relies on persuasive authorities from other states).

189. See, e.g., ALA. CODE § 12-21-142 (1975) (providing an absolute privilege to journalists working in the fields specified by the statute); CAL. EVID. CODE § 1070 (West 2014) (providing a qualified privilege in criminal cases); MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (LexisNexis 2010) (providing a qualified privilege in civil and criminal cases that covers confidential as well as non-confidential information).

190. See, e.g., *Holmes v. Winter*, 3 N.E.3d 694, 701 (N.Y. 2013) (stating that the state shield statute protected a reporter from revealing her sources in an exclusive she wrote regarding the contents of a mass shooter's notebook); *c.f.*, *Too Much Media v. Hale*, 993 A.2d 845, 858 (N.J. Super. Ct. App. Div. 2010) (stating the state shield law protects have some connection to a publication that is similar to traditional media).

191. See *Holmes*, 3 N.E.3d at 701 (discussing the differences between the New York Constitution and the state's Shield Laws).

192. See *Yelp*, 752 S.E.2d at 566 (finding that the Virginia General Assembly considered and rejected factors from other state's unmasking standards).

years before any national consensus or standard requiring evidence and not just allegations had developed.¹⁹³ Instead of reporting a range of factors that other states used in their unmasking standards, as the majority opinion in *Yelp* characterized it,¹⁹⁴ the report noted the lack of authority from other jurisdictions¹⁹⁵ and that no state or federal appellate court had yet endorsed a particular formulation regarding the level of scrutiny or balancing test to be applied.¹⁹⁶ The report also incorrectly states that the *Dendrite* court's approach requires even less than a "full motion to dismiss standard."¹⁹⁷

3. *Section 8.01-407.1 Incorporates the Evidence Requirement That Other States Have Held to be Required by the First Amendment*

Section 8.01-407.1(A)(1)(a) requires a plaintiff seeking discovery to show that the communications that are or may be tortious or illegal have been made by the anonymous communicator, or that the party requesting the subpoena has a legitimate, good faith basis to contend that such party is the victim of conduct actionable in the jurisdiction.¹⁹⁸ While the court interpreted this statute to be lenient and require Hadeed to only believe the anonymous reviews could possibly be defamatory, each prong of the statute actually replicates what the courts in other states are trying to accomplish by their evidence-requiring First Amendment tests.¹⁹⁹ However, the court decided to ignore the statutory standards and the multi-jurisdictional approach and instead allowed Hadeed to bring a defamation claim without presenting any evidence that the statement made about Hadeed was false, or that

193. Cases influenced by *Dendrite* that requiring a strict showing of evidence. *See, e.g.*, *Doe v. Cahill*, 884 A.2d 451, 463 (Del. 2005); *Mobilisa, Inc. v. Doe*, 170 P.3d 712, 720 (Ariz. Ct. App. 2007) (rejecting plaintiff's assertion to adopt the less stringent standards set forth in *Sony Music* and *Seescandy.com*); *Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231, 244–245 (Cal. Ct. App. 2008).

194. *Yelp*, 752 S.E.2d at 566 (rejecting persuasive authority from other states on the basis that the Virginia Legislature considered these factors).

195. *See* Dep't of Educ., DISCOVERY OF ELECTRONIC DATA 23–24 (2001), available at [http://leg2.state.va.us/dls/h&sdocs.nsf/fc86c2b17a1cf388852570f9006f1299/51339235f994794285256b21006a2406/\\$FILE/SD9_2002.pdf](http://leg2.state.va.us/dls/h&sdocs.nsf/fc86c2b17a1cf388852570f9006f1299/51339235f994794285256b21006a2406/$FILE/SD9_2002.pdf).

196. *See id.* at 24 (stating that no state or federal appellate court has yet endorsed a particular formulation of the level of scrutiny or balancing test to be applied in this precise context, where the fundamental right of anonymous free speech is implicated in a private litigation where the identity of the author is arguably necessary to the outcome).

197. *See id.* at 26–27.

198. *See* VA. CODE ANN. § 8-01-407.1(A)(1)(a) (West 2014).

199. *See Dendrite Int'l, Inc. v. Doe*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001) (showing that the words "are or may be tortious" are comparable to the prima facie principles in *Dendrite* and similar cases).

the statement has caused damage to its business reputation.²⁰⁰ If the court had interpreted section 8.01-407.1 correctly and required an evidentiary showing from Hadeed, Hadeed's lack of a claim and lack of reputational harm, the identifying information would not have even been needed, as the claim could not succeed even if the identifying information were obtained, paralleling the *Dendrite* standard.²⁰¹ When looking at the first prong of section 8.01-407.1(A)(1)(a), the words "are or may be tortious" are comparable to the prima facie principles in *Dendrite* and similar cases, which use the existence of evidence of falsity and damages to test whether the plaintiff has a realistic claim or only an imaginary one.²⁰² Similarly, under the second part of subsection (a), the plaintiff must do more than show good faith; they must also show a "legitimate" basis for claiming that the speech was tortious.²⁰³ This requirement parallels the rule in other states that a plaintiff seeking relief must show an evidentiary basis for their claim.²⁰⁴ In addition, under subsection (b) of section 8.01-407.1, the plaintiff must show that identifying information is "centrally needed to advance the claim," or relates to a "core claim or defense," or is "directly and materially related to that claim."²⁰⁵ Therefore, if the plaintiff bringing the defamation claim does not even have evidence that a statement about the plaintiff is false, just like in Hadeed's case,²⁰⁶ or evidence that the statement has caused damage to its business reputation, then the identifying information is not needed, and the claim could still not succeed even if the identifying information were obtained.²⁰⁷ Thus, Hadeed's admission that he is uncertain whether or not his claim is true and his failure to show any damage to his reputation makes it impossible for his claim to succeed.

200. See Brief for Yelp at 5, *Yelp v. Hadeed* 752 S.E.2d 554 Va. Ct. App. (2014) (No. 0116-13-4) (explaining that Hadeed never denied that it sometimes charges twice the advertised price).

201. See *Dendrite*, 775 A.2d at 756 (showing that the plaintiff in a defamation case must show sufficient evidence on each element of the cause of action to demonstrate a prima facie claim).

202. See *id.*

203. See § 8-01-407.1(A)(1)(a).

204. See, e.g., *Dendrite*, 775 A.2d at 760–61 (requiring an evidentiary showing); see also *Doe v. Cahill*, 884 A.2d 451 (Del. 2005) (requiring plaintiffs to support claim with facts sufficient to defeat a summary judgment motion).

205. See § 8-01-407.1(A)(1)(b).

206. See *Yelp v. Hadeed Carpet Cleaning*, 752 S.E.2d 554, 570 (Va. Ct. App. 2014) (stating that Hadeed did not know if the anonymous reviewers were customers or not).

207. This requirement parallels the *Dendrite* standard for adjudicating subpoenas.

4. *The Court Erred by Interpreting Section 8.01-407.1 to Allow Disclosure of Any Speech That “May Be Tortious” Simply Based on an Unsupported Allegation, which Is Inconsistent with the First Amendment*

Under § 8.01-407.1, if the identity of the speaker is sufficiently material to a core claim or defense, the requester “must show that one or more communications that are or may be tortious or illegal have been made by the anonymous communicator.”²⁰⁸ However, a defendant’s First Amendment rights are not protected when the statute’s requirement that the communication “may be tortious” is read too narrowly, as it holds that a plaintiff’s mere allegation without further evidence is sufficient to identify the speaker.²⁰⁹ The Court of Appeals cited to several different cases when arguing that defamatory speech is not entitled to the same protection as truthful or political speech, and thus, the First Amendment did not apply in this case.²¹⁰ Neither the Virginia cases nor the Supreme Court cases cited by the trial court are applicable here, because they rely on an adjudication of defamation.²¹¹

While speech is not protected if it is proven false, revealing the identity of a speaker before the plaintiff offers such proof eliminates the interest in remaining anonymous, which cannot be restored if the proof is later, found to be insufficient, and the loss of the First Amendment right can be significant.²¹²

In light of the constitutional rights that were at stake during this case, the court should have looked not only at section 8.01-407.1, but also looked at the entire issue more broadly.²¹³ The Court of Appeals threw out the First Amendment rights of the anonymous reviewers by not compelling Hadeed to come forth with any material evidence at all, essentially determining that leaving a review is enough reason to satisfy the good faith requirement of section 8.01-407.1.²¹⁴ This precedent, if unchecked, could lead to readily

208. VA. CODE ANN. § 8.01-407.1(A)(1)(a)–(c).

209. *See Yelp*, 752 S.E.2d at 566–67 (showing that Hadeed’s mere allegation of defamation was enough for the court to find good faith basis).

210. *See Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952) (stating that libelous utterances are not within the area of constitutionally protected speech).

211. *See Yelp*, at 752 S.E.2d at 566–67 (stating that a defamation claim depends on an unproven assumption).

212. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976) (stating that losing First Amendment freedom, regardless for how long, unquestionably constitutes irreparable injury); *Melvin v. Doe*, 836 A.2d 42, 50 (Pa. 2003) (holding that once an identity is disclosed, the “First Amendment claim is irreparably lost as there are no means by which to later cure such disclosure”).

213. *See Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001) (observing that stripping Internet users of anonymity by a civil subpoena would significantly affect Internet communications and thus infringe on basic First Amendment rights).

214. *See Yelp*, 752 S.E.2d at 567 (stating Hadeed had a good faith basis because it could find no proof of the posters being customers).

obtainable subpoenas that allow businesses and corporations to react to negative feedback and intimidate their critics into silence.²¹⁵

E. The Court of Appeals Erred By Not Following the National Consensus Standard of the Balancing Test

The consensus approach followed in many states requires a plaintiff to come forward with both legal argument and an evidentiary basis showing that the plaintiff has a realistic claim against the anonymous speakers that it seeks to identify through compulsory process. These courts have recognized that the best standard to use is one that “strikes the right balance between the interests of the accused defendant’s First Amendment right to speak anonymously” with the plaintiff’s interest in “attaining reparation for allegedly tortious speech.”²¹⁶

1. The National Consensus Standard Is a Dendrite Balancing Test, under which Plaintiffs with Valid Claims Routinely Succeed, while Providing Protection Against Needless Loss of the Right to Speak Anonymously

Although Virginia has never been presented with the issue unmasking anonymous internet users, the issue is not as novel around the rest of the country.²¹⁷ About a dozen other states having encountered the same question and their holdings are squarely at odds with the holding of the Virginia Court of Appeals.²¹⁸ These courts have each recognized that best standard to use in cases like

215. See LyriSSa BArnet Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 881–82 (2000) (stating, “The mere fact of being uncovered may itself be enough to stop the alleged defamer from posting further messages.”).

216. See generally *In re Indiana Newspapers*, 963 N.E.2d 534 (Ind. App. 2012).

217. See, e.g., cases New Jersey, Maryland, Delaware, Arizona, California, Indiana, New Hampshire, Texas, Pennsylvania, and the District of Columbia.

218. See, e.g., *In re Indiana Newspapers*, 963 N.E.2d 534, 552 (Ind. App. 2012) (adopting the modified *Dendrite* test); *Pilchesky 1 v. Gatelli*, 12 A.3d 430, 445 (Pa. Super. 2011) (stating that the reviewing court must conduct the *Dendrite* balancing test); *Mortgage Specialists v. Implode-Explode Heavy Indus.*, 999 A.2d 184, 193 (N.H. 2010) (ordering the trial court to apply *Dendrite* test); *Solers, Inc. v. Doe*, 977 A.2d 941, 954 (D.C. 2009) (employing some aspects of the *Dendrite* test); *Independent Newspapers v. Brodie*, 966 A.2d 432, 457 (Md. 2009) (favoring the *Dendrite* test); *Krinsky v. Doe* 6, 72 Cal. Rptr.3d 231 (Cal. App. 2008) (ruling that a plaintiff to make a prima facie showing of the elements of libel in order to overcome a defendant’s motion to quash a subpoena); *In re Does 1–10*, 242 S.W.3d 805 (Tex. App. 2007) (endorsing the Highfields Capital test); *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App. 2007) (adopting a *Dendrite-Cahill* hybrid standard); *Doe v. Cahill*, 884 A.2d 451 (Del. 2005) (creating the *Cahill* standard).

this rests on the need to strike just the right balance between the interests of the accused defendant's First Amendment right to speak anonymously with the plaintiff's interest in attaining reparation for allegedly tortious speech.²¹⁹ While the opinion of the Court of Appeals seems to suggest that the other states that have tackled this issue have reached varying results, there is actually significant consistency in standards adopted around the country.²²⁰ Various courts have held that a plaintiff cannot unmask a defendant alleged of engaging in defamatory speech without first presenting admissible evidence of the elements of the cause of action that the plaintiff alleges.²²¹ Two courts have created their own rules either to require evidence before the subpoena can be sought, or to give the Doe defendant the opportunity to obtain a protective order if such evidence is not provided.²²² And of the ten states requiring admissible evidence of the elements of the cause of action that the plaintiff alleges before a defendant can be unmasked, six apply an equitable balancing test even if the plaintiff meets the presenting minimal evidence.²²³ Virginia is not the only state that has refused to compel the disclosure of identifying information without any evidence, thereby declining to protect First Amendment anonymous speech rights.²²⁴

219. *Id.*

220. Appellate courts in Arizona, California, Delaware, Indiana, Maryland, New Hampshire, New Jersey, Pennsylvania, Texas, and the District of Columbia have all followed the standard set in *Dendrite v. Doe*, 775 A.2d 756 (N.J. App. 2001).

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

222. *See Maxon v. Ottawa Pub. Co.*, 929 N.E.2d 666 (Ill. App. 3d Dist. 2010) (discussing the Illinois standard that a party seeking the identity of an unknown defendant comply with the specific requirements of a Rule 224 petition); *Thomas M. Cooley Law Sch. v. Doe 1*, 833 N.W.2d 331 (Mich. App. 2013) (choosing to address the issue only under the state rules of court); *Ghanam v. Does*, 845 N.W.2d 128, 2014 WL 26075 (Mich. App. Jan. 2, 2014) (endorsing the *Dendrite* approach).

223. *See generally Dendrite Int'l, Inc. v. Doe*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001) (stating 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); *In re Indiana Newspapers*, 963 N.E.2d 534 (Ind. App. 2012) (adopting the modified *Dendrite* test); *Pilchesky 1 v. Gatelli*, 12 A.3d 430 (Pa. Super. 2011) (stating the reviewing court must conduct the *Dendrite* balancing test); *Mortgage Specialists v. Implode-Explode Heavy Indus.*, 999 A.2d 184 (N.H. 2010) (ordering the trial court to apply *Dendrite* test); *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App. 2007) (adopting a *Dendrite–Cahill* hybrid standard).

224. *See, e.g., 4 Highfields Capital Mgmt. v. Doe*, 385 F. Supp. 2d 969, 976

While plaintiffs who have genuine defamation claims can easily meet the national consensus standard, the showing that the Virginia Court of Appeals held to be acceptable under section 8.01-407.1 is so low that it essentially provides a “license to unmask” without any basis.²²⁵ Knowing that trial courts will not demand an evidentiary basis, as seen in this case, future plaintiffs can simply claim that they have doubts that an anonymous critic is actually one of its customers, even if the critic’s speech is typical of what many other consumers have already said about the business.²²⁶ The decision by the Court of Appeals sets a very dangerous precedent and hence runs afoul of the First Amendment right to speak anonymously.²²⁷

IV. CONCLUSION

Anonymity has a long history in American discourse, and it has played a vital role in the evolution of our country.²²⁸ The concept of anonymous speech is one of the main pillars of a truly free society, by allowing the free flow of beliefs, expressions, and opinions into the public market of ideas without the threat of fear.²²⁹ With the invention of the Internet, this market of ideas is now open at all hours of the day and night and any person with a phone line can “become a town crier with a voice that resonates farther than it could from any soapbox.”²³⁰ At no time in history has any given person ever held as much power as they do today, and while this has allowed for innovation and revolution that would have been impossible to achieve only fifteen years ago, it has also opened the door for new methods of destruction and harm.²³¹

(N.D. Cal. 2005) (requiring an evidentiary showing followed by express balancing of “the magnitude of the harms that would be caused to the competing interests”); *Art of Living Foundation v. Does 1–10*, 2011 WL 5444622 (N.D. Cal. Nov. 9, 2011) (endorsing the *Highfields Capital* test).

225. *See Yelp*, 752 S.E.2d at 570 (Haley, S.J., dissenting) (stating that the majority’s holding of § 8.01-407.1 allows a business to identify an anonymous critic without any material evidence).

226. *Id.*

227. *See id.* (stating that the balance envisioned by § 8.01–407.1 should weigh for the protection afforded by our Constitutions).

228. *See McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 360 (1995) (Thomas, J., concurring) (discussing an example of the “outpouring of anonymous political writing that occurred during the ratification of the Constitution”).

229. *See Doe v. 2TheMart.com*, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001) (observing that “[i]f Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights”).

230. *See Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997) (illustrating the effect of the Internet on communication).

231. Noam Cohen & Brian Stelter, *Iraq Video Brings Notice to a Web Site*,

The decision in *Yelp v. Hadeed Carpet Cleaning* has significant ramifications for the future of anonymous speech, and while this case is already on its way to the Supreme Court of Virginia, this issue will almost certainly see its day at the United States Supreme Court in the very near future.²³² When the Supreme Court of Virginia hears this case later on this year, the Court should take into account all of section 8.01-407.1's pitfalls and First Amendment issues and strike it down.²³³

At the very least, the Supreme Court of Virginia must review the Court of Appeals decision in *Yelp v. Hadeed Carpet Cleaning* and declare that even with section 8.01-407.1's extremely low standards, Hadeed did not allege any substantive claims, nor did it present any evidence that false statements were made.²³⁴ Further, the Court of Appeals should have interpreted the language in section 8.01-407.1 more vigorously, as to require a stronger evidentiary showing standard, as well as a stronger balancing test.²³⁵

Perhaps most importantly, the Supreme Court of Virginia must reject the Court of Appeals ruling that the anonymous Yelp reviews equaled commercial speech.²³⁶ The Court of Appeals reasoning in this decision is strange, as case law states that commercial speech is speech that proposes a commercial transaction, something that is totally absent in all of the Yelp reviews.²³⁷

The Court of Appeals was incorrect in finding that Hadeed's claim of defamation was valid and by ruling the Doe defendant's anonymous reviews to be commercial speech.²³⁸ The Court also should have rejected section 8.01-407.1 due to its constitutional

N.Y. TIMES, Apr. 6, 2010, http://www.nytimes.com/2010/04/07/world/07wiki_leaks.html (stating that we live in a world where people can do both good and terrible things without accountability).

232. See *Yelp v. Hadeed Carpet Cleaning, Inc.*, 752 S.E.2d 554, 566 (Va. Ct. App. 2014) (rejecting persuasive authorities following the national consensus).

233. See *id.* at 570 (Haley, J., dissenting) (stating that the majority's holding of § 8.01-407.1 allows a business to identify an anonymous critic without any material evidence).

234. See *id.* (stating, "Nowhere in this cause has Hadeed claimed that any of the substantive statements are false.").

235. See VA. CODE ANN. § 8.01-407.1 (requiring supporting material and a "legitimate, good faith basis" for asserting a claim and requiring a plaintiff to submit "supporting material" that supports its unmasking request).

236. See *Yelp*, 752 S.E.2d at 560–61 (stating that the reviews were commercial speech and therefore subject to lesser First Amendment protection).

237. See *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 562 (1980) (defining commercial speech as limited only to advertising that did no more than "propose a commercial transaction").

238. See *Cent. Hudson*, 447 U.S. at 580 (stating examples of speech proposing a commercial transaction as "[a] salesman's solicitation, a broker's offer, and a manufacturer's publication of a price list or the terms of his standard warranty").

issues and adopted the much stronger *Dendrite* standard that has already been accepted in the majority of the country.²³⁹ For these reasons, the Supreme Court of Virginia should reverse this case when it hears it later this year.²⁴⁰

239. *See, e.g.*, *Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432 (Md. 2009) (stating that extrinsic facts must be alleged in the complaint to establish the defamatory character of the words or conduct); *Krinsky v. Doe 6*, 159 Cal. App. 4th 1154, 1172 (2008) (requiring plaintiffs to make prima facie showing of elements of alleged torts of defamation); *Doe v. Cahill*, 884 A.2d 451, 460 (Del. 2005) (requiring plaintiffs to support claim with facts sufficient to defeat a summary judgment motion).

240. *Yelp Inc. v. Hadeed Carpet Cleaning*, 752 S.E.2d 554 (Va. App. Ct. App. 2014), *cert. granted*, 2014 Va. LEXIS 84 (May 29, 2014) (No. 140242).

