IN THE SUPERIOR COURT OF LOWNDES COUNTY

STATE OF GEORGIA

KENNETH JOHNSON and JACQUELYN JOHNSON, Plaintiffs, -v- BRANDEN R. BELL; BRIAN E. BELL; RICHARD E. BELL, JR., in his individual capacity and as parent of Brandon Bell and Brian Bell, et al., Defendants. BRANDEN R. BELL; BRIAN E. BELL; RICHARD E. BELL, JR., in his individual capacity and as parent of Brandon Bell and Brian Bell, Counterclaim Plaintiffs, -v- KENNETH JOHNSON and JACQUELYN JOHNSON, Counterclaim Defendants.	Civil Action No. 2015CV0706 **Brief of the American Civil Liberties Union and the American Civil Liberties Union of Georgia as *Amici Curiae* in Support of Neither Party**

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Interests of *Amici Curiae*

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with approximately 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Georgia is a state affiliate of the ACLU. Founded in 1920, the ACLU has vigorously defended the First Amendment for nearly a century in state and federal courts across the country. It has also been at the forefront of efforts to ensure that the Internet remains a free and open forum for the exchange of information and ideas, and to ensure that the right to privacy remains robust in the face of new technologies. The ACLU has served as direct counsel and amicus in cases raising these issues. *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844 (1997); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002).

The ACLU and ACLU of Georgia file this brief in order to highlight the First Amendment implications of a subpoena obtained by the counterclaim–plaintiffs, and to urge the Court to consider these implications before allowing discovery of the identities of the twenty-three individuals named in the subpoena.

Introduction

This case involves a claim for wrongful death and various other torts brought by Kenneth and Jacquelyn Johnson following the death of their son, Kendrick Johnson, in January 2013. Defendants Branden, Brian, and Richard Bell have filed a counterclaim against the Johnsons for defamation, and, on October 16, 2015, obtained a subpoena requiring Twitter, Inc. to disclose by November 12, 2015 the identity of twenty-three Twitter users who, according to allegations in the answer and counterclaims, were used by the Johnsons "as their authorized agents to post

messages on . . . Twitter . . . that were defamatory to the Bells."[1] Counterclaims ¶ 5. According to the Bells, the allegedly defamatory Twitter comments accuse Brian and Branden Bell of murdering their classmate Kendrick Johnson, and their father, Richard Bell, of conspiring with his sons to cover up the murder. *See id.* ¶¶ 6–19. The individuals whose identities are sought in the subpoena are listed by their Twitter usernames.[2] Most of the listed usernames and accounts are pseudonymous, and do not include the name or other identifying information of the account holder in the account's public profile information.

The First Amendment protects the right to speak anonymously on the Internet, and a subpoena that—like the one at issue here—seeks the identity of anonymous Internet speakers therefore poses serious First Amendment concerns. In light of these concerns, courts unanimously agree that the Constitution limits the circumstances in which a litigant may enforce a subpoena that would "unmask" anonymous speakers. Those courts have typically held that defamation plaintiffs must, at a minimum, provide notice of the subpoena to the individuals whose identities are sought and make a preliminary showing of merit to their claims before unmasking is constitutionally permissible. Furthermore, when, as here, a defamation plaintiff seeks the identity of a *non-party*, courts have required more: a plaintiff must also show that the information in the possession of the non-party is material and non-cumulative.

Although these inquiries are usually litigated by the subpoenaed third-party or the individuals whose identities are sought, courts have also recognized an independent duty to undertake the inquiries on their own initiative. Exercising that duty is especially important in this

[1] The subpoena is submitted herewith as "Attachment A." To the extent other "unmasking" subpoenas are filed in this case, the same arguments apply.

[2] A Twitter username is a user's unique identifier on Twitter. A username need not correspond to a Twitter user's true name. *See Signing Up With Twitter*, TWITTER.COM, https://support.twitter.com/articles/100990 (last visited Nov. 16, 2015).

case. While a full assessment of the Twitter users' statements will only be possible after the Court directs the counterclaim–plaintiffs to make the showing that is constitutionally required of them, it is clear from the counterclaims and even a cursory review of the individuals' Twitter accounts that the speech in question involves political activism and relates to a matter of public concern. The counterclaim–plaintiffs accuse the twenty-three Twitter users of commenting on the death of Kendrick Johnson and on allegations of a cover-up by the Bells and local law enforcement. *See* Counterclaims ¶¶ 6–19. This is a matter that has received considerable national media attention. *See, e.g.*, *Parents File $100 Million Suit in Gym-Mat Death of Georgia Teen Kendrick Johnson*, NBC NEWS (Jan. 15, 2015), http://www.nbcnews.com/news/us-news/parents-file-100-million-suit-gym-mat-death-georgia-teen-n287076. Moreover, the Twitter users' accounts reveal the frequent use of political "hashtags"—that is, identifying keywords—such as "#blacklivesmatter." The subpoena in this case therefore implicates core First Amendment rights. *See, e.g.*, *Gwinn v. State Ethics Comm'n*, 426 S.E.2d 890, 892 (Ga. 1993) ("[P]olitical expression [is] at the core of our . . . First Amendment freedoms." (quotation marks omitted)).

The Georgia courts have not yet addressed a challenge to an "unmasking" subpoena in the Internet context. For the reasons explained below, and especially in light of the paramount First Amendment rights implicated by the subpoena in this case, *amici curiae* respectfully urge this Court to follow the consensus in other jurisdictions by requiring the counterclaim–plaintiffs to make the preliminary showings described below before it permits discovery of the Twitter users' identities.

Argument

I. The First Amendment requires trial courts to ensure that the unmasking of anonymous Internet speakers does not occur before a preliminary showing has been made.

A. The First Amendment and Georgia public policy protect anonymous speech.

The First Amendment protects the right to speak anonymously. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341–43 (1995). The U.S. Supreme Court has long recognized that "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." *Id.* at 342. The Court's recognition guards the role that anonymity has played over the course of our nation's history—starting with the Federalist Papers—as "a shield from the tyranny of the majority." *Id.* at 357. The Court has been emphatic: anonymous speech "is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent." *Id.* To vindicate anonymous speech rights, the Court has repeatedly invalidated laws that compel disclosure of speakers' identities. *See Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182 (1999) (striking down statutory provision that required petition circulators to wear identification badges); *McIntyre*, 514 U.S. 334 (striking down statutory provision that prohibited the distribution of anonymous campaign literature); *Talley v. California*, 362 U.S. 60, 64 (1960) (striking down ordinance that required names and addresses to be printed on distributed handbills because the "identification requirement . . . restrict[s] freedom to distribute information and thereby freedom of expression").

Courts in Georgia and elsewhere have also repeatedly recognized that anonymity is a fundamental component of free speech on the Internet. *See, e.g.*, *White v. Baker*, 696 F. Supp. 2d 1289, 1313 (N.D. Ga. 2010) (enjoining Georgia law because it "chill[ed] . . . [the] First

Amendment right to engage in anonymous free speech" on the Internet); *Doe v. 2TheMart.com, Inc.*, 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001) ("Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas."); *State v. Brockmeyer*, 751 S.E.2d 645, 652 n.6 (S.C. 2013) ("[I]t is clear that speech over the internet is entitled to First Amendment protection and that this protection extends to anonymous internet speech." (alterations and quotation marks omitted)); *see also Reno*, 521 U.S. at 870 ("[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet].").

Georgia, moreover, has a "strong public policy" in favor of preserving anonymity in the discovery context; thus, for example, when parties seek to unmask anonymous sources of journalists who are accused of libel, the Georgia courts have held that "the trial court must require the plaintiff to specifically identify each and every purported statement he asserts was libelous, determine whether the plaintiff can prove the statements were untrue, . . . and determine whether the statements can be proven false through the use of other evidence." *Atlanta Journal-Constitution v. Jewell*, 555 S.E.2d 175, 180 (Ga. Ct. App. 2001). Similar policy considerations apply to the circumstances of anonymous speech at issue here and warrant application of similar protections.

B. The First Amendment prevents the compelled disclosure of an anonymous Internet speaker's identity without: sufficient notice to the speaker, a showing that the plaintiff's claims have merit, and a finding that speech rights are outweighed by other interests.

Because the First Amendment safeguards the right to speak anonymously, courts have uniformly held that defamation plaintiffs seeking to unmask anonymous Internet speakers through subpoenas must make a preliminary showing that their claims have merit. *See, e.g.*, *Doe No. 1 v. Cahill*, 884 A.2d 451, 460–64 (Del. 2005); *Dendrite Int'l v. Doe No. 3*, 775 A.2d 756, 760–61 (N.J. App. Div. 2001).

The leading case is *Dendrite*. There, the New Jersey Appellate Division adopted a five-part test for determining whether unmasking anonymous Internet speakers is justified under the First Amendment. It held that a defamation plaintiff must: (1) "undertake efforts to notify" any anonymous speakers "that they are the subject of a subpoena"; (2) "set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech"; (3) state a claim that would survive a motion to dismiss; and (4) "produce sufficient evidence supporting each element of its cause of action, on a prima facie basis." 775 A.2d at 760. If these requirements are met, the trial court must (5) balance "the First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure." *Id.* at 760.

Although the Georgia courts have not yet had occasion to rule on the validity of an unmasking subpoena, other state courts have generally adopted some version of the *Dendrite* test, *see In re Ind. Newspapers Inc.*, 963 N.E.2d 534, 552 (Ind. Ct. App. 2012); *Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432, 456–57 (Md. Ct. App. 2009); *Pilchesky v. Gatelli*, 12 A.3d 430, 445–46 (Pa. Super. Ct. 2011), or a modified test that foregoes the fifth *Dendrite* requirement—the explicit balancing of interests—but retains the core requirements of notice and proof of merit, *see Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231, 245–46 (Ct. App. 2008); *Solers, Inc. v. Doe*, 977 A.2d 941, 954 (D.C. 2009); *Cahill*, 884 A.2d at 460; *In re Does 1–10*, 242 S.W.3d 805, 821 (Tex. Ct. App. 2007). Federal courts have generally adopted either the full *Dendrite* test or its modified counterpart. *See, e.g.*, *SaleHoo Grp. v. ABC Co.*, 722 F. Supp. 2d 1210, 1214–17 (W.D. Wash. 2010) (full *Dendrite* test); *Doe I v. Individuals*, 561 F. Supp. 2d 249, 255–56 (D. Conn. 2008) (modified *Dendrite* test); *cf. Koch Indus., Inc. v. Does*, No. 10 Civ. 1275, 2011 WL 1775765, at *10 (D. Utah May 9, 2011) ("Although courts have adopted slightly different

versions of the test, the case law has begun to coalesce around the basic framework of the test articulated in *Dendrite.*" (alterations and quotation marks omitted)).

The reasoning in all of these decisions, regardless of which version of the test is adopted, is rooted in the recognition that the First Amendment rights of anonymous speakers must be protected from the chilling effect of subpoenas that seek to unmask them. As the Delaware Supreme Court explained, "[t]he revelation of [the] identity of an anonymous speaker may subject that speaker to ostracism for expressing unpopular ideas, invite retaliation from those who oppose her ideas or from those whom she criticizes, or simply give unwanted exposure to her mental processes," thus leading to "self-censor[ship]." *Cahill*, 884 A.2d at 457; *cf. McIntyre*, 514 U.S. at 341–42 ("The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible."). Unmasking is therefore only warranted when "the right of the plaintiff to protect its proprietary interest and reputation" outweighs "the well-established First Amendment right to speak anonymously." *Dendrite*, 775 A.2d at 760; *see also, e.g., Cahill*, 884 A.2d at 461 ("[W]e must adopt a standard that appropriately balances one person's right to speak anonymously against another person's right to protect his reputation."). And these interests can only be properly assessed if, at a minimum, the plaintiff seeking discovery sets forth the precise statements that are allegedly defamatory and demonstrates that the claims based upon them have merit. *Cahill*, 884 A.2d at 461; *Dendrite*, 775 A.2d at 760; *see also, e.g., Pichesky*, 12 A.3d at 445–46 (noting that the reputation-versus-speech interest balancing that must occur in defamation cases "is not achieved until a fact-finder renders a final judgment," and that in unmasking cases, weighing of the parties' respective interests at the discovery phase is required to bring "First Amendment considerations . . . into proper focus").

The final step in the *Dendrite* analysis—the requirement that courts explicitly balance the First Amendment rights of the anonymous speaker against the plaintiff's interest in pursuing his or her claims—is a further safeguard that affords trial courts more flexibility to take the individualized circumstances of each case into account. *See, e.g.*, *Ind. Newspapers*, 963 N.E.2d at 552 (noting that explicit interest-balancing enables courts to consider a range of factors, including "the type of speech involved, the speaker's expectation of privacy, the potential consequence of a discovery order to the speaker and others similarly situated, the need for the identity of the speaker to advance the requesting party's position, and the availability of other discovery methods"). This step is important because, although all John/Jane Doe subpoenas threaten the First Amendment rights of anonymous speakers, some may serve a more urgent interest than others, and some may do more harm than others. *See* Paul Alan Levy, *Developments in* Dendrite, 14 Fla. Coastal L. Rev. 1, 15 (2012) ("[I]n some cases the speaker stands to lose more than a theoretical interest, insofar as identifying the speaker may expose her to a significant likelihood of adverse private consequences. On the other hand, sometimes it is the plaintiff that has an interest that is particularly strong because there is an especially high likelihood of significant damage to the plaintiff." (citation omitted)). It is important to note, however, that courts electing to forego the explicit balancing requirement do so not because they disagree that the competing interests must be weighed, but because they recognize interest-balancing as inherent in the other prongs of the test and therefore consider the fifth step superfluous. *See Cahill*, 884 A.2d at 461 ("The [explicit interest-balancing] requirement . . . is . . . unnecessary. The summary judgment test is itself the balance.").

C. When litigants seek to unmask non-parties, there must be an additional finding that the information sought from them is directly and materially relevant to a core claim in the action, and not cumulative.

Unlike this case, the cases cited above involved subpoenas seeking the identities of John/Jane Doe defendants. In such cases, courts have recognized that, so long as the plaintiff can satisfy one of the tests described above, unmasking is typically warranted, because the need for the information sought is "especially great," as the litigation cannot proceed without it. *2TheMart.com*, 140 F. Supp. 2d at 1094–95. Such a need is not necessarily present when, as here, an unmasking subpoena seeks the identity of a non-party. *See Mobilisa, Inc. v. Doe 1*, 170 P.3d 712, 720 (Ariz. Ct. App. 2007) ("The requesting party's ability to survive [the modified *Dendrite* test] would not account for the fact that in [a non-party subpoena] case it may have only a slight need for the anonymous party's identity."). For this reason, courts have held that the unmasking of a non-party is appropriate only "in the exceptional case" in which some other "compelling need for the discovery sought outweighs the First Amendment rights of the anonymous speaker." *2TheMart.com*, 140 F. Supp. 2d at 1095; *see also McVicker v. King*, 266 F.R.D. 92, 95 (W.D. Pa. 2010) ("[I]t is clear that a party seeking disclosure must clear a higher hurdle where the anonymous poster is a non-party."); *Sendersten v. Taylor*, No. 09 Civ. 3031, 2009 WL 4802567, at *2 (W.D. Mo. Dec. 9, 2009) (same). To establish a "compelling need," plaintiffs must show, at a minimum, that "the identifying information [be] directly and materially relevant to [a core] claim or defense" in the action, and not available "from any other source." *2TheMart.com*, 140 F. Supp. 2d at 1094–95; *see also McVicker*, 266 F.R.D. at 96 (finding showing not satisfied where information related only to impeachment and was available from other sources); *Sendersten*, 2009 WL 4802567, at *2 (finding showing not satisfied where facts

sought from anonymous non-party were cumulative of evidence from other sources); *Enterline v. Pocono Med. Ctr.*, 751 F. Supp. 2d 782, 787–88 (M.D. Pa. 2008) (same).

D. Courts have an independent duty to ensure that anonymous speech rights are protected.

Once an individual's identity is learned, it cannot be unlearned, and her right to anonymity cannot be restored. It is therefore crucial that the tests described above be applied *before* unmasking occurs. Thus, even when no motion to compel or to quash has been filed, courts must independently ensure that the unmasking standard has been met before the identity of an anonymous speaker is revealed.[3] *See Ghanam v. Does*, 303 Mich. App. 522, 541 (2014) ("This evaluation is to be performed even if there is no pending motion . . . before the court."); *Call of the Wild Movie, LLC v. Does 1–1,062*, 770 F. Supp. 2d 332, 341 n.4 (D.D.C. 2011) (undertaking sua sponte review of anonymous speech issue arising in discovery context); *cf. Dombrowski v. Pfister*, 380 U.S. 479, 486-87 (1965) (stating the bedrock First Amendment principle that the rights of parties not before the court must often be litigated in order to afford breathing room to free speech).

II. This Court should direct the counterclaim–plaintiffs to demonstrate that the Twitter users named in the subpoena have received notice, that the defamation counterclaims have merit, and that there is a compelling need for information in the sole possession of the anonymous Twitter users.

Although the Georgia courts have not yet had occasion to determine which unmasking standard to use in the context of anonymous Internet speech, the other state courts to have done

[3] Unmasking cases tend to arise when the parties, or the subpoenaed third-party, trigger review by filing a motion to compel discovery, to quash the subpoena, or for a protective order. *See, e.g. Cahill*, 884 A.2d at 455 (motion for a protective order); *Dendrite*, 775 A.2d at 763–64 (motion for leave to conduct discovery). As this case demonstrates, however, there will sometimes be circumstances in which a court must, on its own initiative, hold the plaintiff to the applicable burden of providing notice of the subpoena and substantiating the claims in the lawsuit.

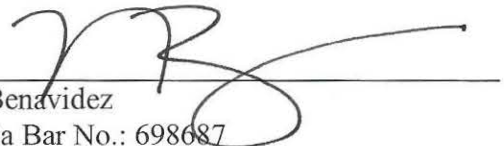
so agree that unmasking is unconstitutional unless the subpoenaing party can satisfy the tests described above. In light of these precedents, and in order to safeguard the First Amendment rights of the twenty-three Twitter users named in the counterclaim–plaintiffs' subpoena, *amici curiae* respectfully urge this Court to: (1) assure that the counterclaim–plaintiffs have adequately attempted to notify all twenty-three individuals of the subpoena so that they have the opportunity to oppose discovery; (2) require the counterclaim–plaintiffs to enumerate the precise (allegedly defamatory) statements made by each of the twenty-three individuals named in the subpoena; (3) evaluate the adequacy of the counterclaim–plaintiffs' defamation claim to determine whether it would survive a motion to dismiss; (4) require the counterclaim–plaintiffs to come forth with evidence sufficient to establish a prima facie case of defamation under Georgia law; and (5) explicitly balance the interests of the counterclaim–plaintiffs in safeguarding their reputations against the specific First Amendment rights implicated by this case. Of particular relevance in this assessment is the fact that the anonymous Twitter users have engaged in political speech regarding a matter of public concern, and that core First Amendment rights are therefore at issue. *See, e.g.*, *Gwinn*, 426 S.E.2d at 892.

Furthermore, given that the unmasking subpoena in this case seeks the identities of exclusively non-parties, *amici curiae* respectfully urge the Court to require the counterclaim–plaintiffs to demonstrate why this is the "exceptional case" in which a "compelling need for the discovery sought outweighs the First Amendment rights of the anonymous speaker." *2TheMart.com*, 140 F. Supp. 2d at 1095. To satisfy this burden, the counterclaim–plaintiffs should be required to show that information in the sole possession of the twenty-three Twitter users is both "directly and materially relevant" to their defamation counterclaims and sufficiently non-cumulative.

Conclusion

For these reasons, *amici curiae* respectfully urge the Court to issue an order requiring the counterclaim–plaintiffs to demonstrate that they have taken all possible steps to notify the anonymous defendants of the subpoena; to enumerate the precise statements by each anonymous Twitter user that they believe to be defamatory; to demonstrate that their counterclaims would survive a motion to dismiss; to offer sufficient evidence to support a prima facie case of defamation; and to demonstrate a "compelling need" for information in the possession of the non-party Twitter users. Should the counterclaim–plaintiffs satisfy this burden, the Court should balance the interests of the counterclaim–plaintiffs in protecting their reputations against the First Amendment rights of the anonymous Twitter users to engage in core political speech about matters of public concern.

Respectfully submitted this 18th day of November, 2015.



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