IN THE SUPREME COURT OF PENNSYLVANIA

No. _____

JOAN MELVIN,

Respondent

V.

JOHN DOE, ALLEN DOE, BRUCE DOE, CARL DOE, DAVID DOE

EDWARD DOE, FRANK DOE, GEORGE DOE, HARRY DOE,

IRVING DOE, KEVIN DOE, LARRY DOE, AND JANE DOE,

Petitioners.

PETITION FOR ALLOWANCE OF APPEAL

Petition for Allowance of Appeal from the Judgment Entered November 20, 2001,

In the Superior Court of Pennsylvania at Nos. 2115 WDA 2000 and 2116 WDA 2000

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ORDERS APPEALED FROM, WITH REFERENCE TO OPINIONS BELOW

Petitioner seeks review of the Decision of the Superior Court, entered November 20, 2001, quashing the appeals at Nos. 2115 & 2116 W.D.A. 2000. The Opinion of the Superior Court, also dated November 20, 2001, which deemed the appeal to be interlocutory and not within the "collateral order" rule, is reported at *Melvin v. Doe*, 2001 Pa. Super. 330, ___ A.2d ___ (Nov. 20, 2001) (Brosky, J.) and is Appendix "1" hereto.

On January 31, 2002, the Superior Court entered the following further Order:

> The Court hereby DENIES the application filed December 4, 2001, requesting reargument or reconsideration of the decision dated November 20, 2001.
>
> PER CURIAM

Appendix "2" hereto.

An Opinion by the trial court in this matter is reported at *Melvin v. Doe*, 49 Pa. D.&C. 4th 449 (Allegh. Co. 2000) (Wettick, J.). This Opinion is Appendix "3" hereto.

QUESTIONS PRESENTED FOR REVIEW

I. Does a party who wishes to protect his or her First Amendment right to speak anonymously have a right to appellate review of that issue, under the collateral order doctrine, before his or her identity has been forced out through court-ordered discovery?

(Answered in the negative in the Superior Court;

suggested in the affirmative in the trial court.)

II. Does the First Amendment allow a public official suing for defamation to force disclosure, through court-ordered discovery, of the identity of an individual who makes an anonymous criticism on the Internet, without first proving economic harm?

(Issue not reached by the Superior Court;

Answered in the negative in the trial court.)

STATEMENT OF THE CASE

This case presents novel issues of national importance involving a citizen's First Amendment right to criticize a public official in an anonymous posting on the Internet. Judge Joan Orie Melvin (hereinafter "Melvin" or "Respondent"), of the Pennsylvania Superior Court, brought this defamation action against a number of "John Doe" defendants (hereinafter "Doe" or "Petitioner") who maintained a Web page devoted entirely to commentary on local politics and politicians. The Web page had commented on political activity and urged readers not to vote for Melvin's retention.[1]

This case is typical of a rapidly expanding category of Internet defamation actions, as public figures increasingly opt to sue their anonymous online critics.[2] Although some of these new suits appear to be legitimate defamation actions, others appear to be brought by public figures for the purposes of unmasking, harassing and ultimately silencing legitimate criticism of their behavior. The difficult, important, and unsettled issues raised by this new category of Internet defamation actions have taken center stage in the public debate over the scope of the right to free speech in cyberspace. This case in particular has garnered national attention.[3] America Online, concerned with the growing number of identity-seeking subpoenas it receives in defamation cases that may be frivolous, filed a lengthy amicus brief in the trial court asking for guidance. *See* Brief Amicus Curiae of America Online, Inc., filed February 24, 2001. Doe argues that, in order to protect the First Amendment right to criticize public officials anonymously on the Internet, the Court should require defamation plaintiffs to prove economic harm before they can unmask their critics through discovery. By granting review in this case, this Court would provide guidance to litigants in Pennsylvania and nationwide about how to accommodate the right to speak freely and anonymously in cyberspace with a state's interest in protecting citizens from defamatory communications.

In March of 1999, Melvin filed a three-paragraph complaint against Doe in Loudoun County, Virginia Circuit Court. At the same time, and before any attempt to serve original process, Melvin subpoenaed America Online (AOL) seeking information that would identify Doe. R.116a. Doe entered a special appearance for the purpose of moving to quash the subpoena to AOL and moving the Virginia Court to dismiss for lack of jurisdiction. These motions were granted on June 24, 1999. R.115a.

On July 9, 1999, Melvin commenced an action against Doe in the Court of Common Pleas of Allegheny County (G.D. No. 99-10264) by writ of summons. On September 7, 1999, the Court of Common Pleas (Wettick, J.) entered an order withdrawing additional subpoenas served by Melvin prior to the filing of a Complaint and directing Melvin to file a Complaint. R.121a. Shortly after Melvin filed her Complaint on October 8, 1999, R.123a, the trial court stayed Melvin's discovery regarding identity until the defendants had an opportunity to show that Melvin could not make out a prima facie case. Opinion of November 15, 2000 (Appendix "3"), at 2-3, 49 Pa. D.&C.4th at 452.

During discovery, Melvin refused to answer questions regarding any form of economic harm she might claim to have suffered as the result of the Web page. In response, the trial court ruled:

> Unless within ten days plaintiff requests that she be given the opportunity to testify as to these matters at a second deposition, in deciding any initial summary judgment motion which defendants file, I will assume that plaintiff would have stated that she had no evidence to support a claim of actual damages with respect to those matters that she declined to answer.

R.129a. Melvin never responded to this ruling; it is thus conceded that she has no special damages or economic injury arising from the comments that appeared on the Doe's Web page.

On May 22, 2000, Doe filed a Motion for Summary Judgment and Motion for a Protective Order, arguing that the First and Fourteenth Amendments to the United States Constitution required proof of economic harm before a public official plaintiff could obtain the identity of an anonymous Internet critic, and seeking summary judgment because Melvin had conceded that she suffered no harm. Melvin filed a partial Motion for Summary Judgment arguing that she had conclusively proven defamation.

On November 15, 2000, the trial court (Wettick, J.) denied both Summary Judgment motions, and denied Doe's Motion for a Protective Order. The court further terminated the existing stay preventing discovery of Doe's identity. In its opinion, the trial court recognized and discussed in detail the First Amendment right to anonymity. While specifically recognizing that "the availability to public officials of state libel causes of action will have an impact on anonymous Internet criticism of public officials made in good faith," the trial court nevertheless held that the case law "precludes the interpretation of the First Amendment that defendants propose." 49 Pa. D.&C. 4th at 481.

On December 6, 2000, the trial court denied Doe's Motion to Permit Interlocutory Appeal. The court noted that it "d[id] not disagree with defendants' contention that there will not be meaningful appellate review of defendants' First Amendment claims to anonymity if review is postponed until a final judgment in this case. This concern, however, is addressed in Pa.R.A.P. No. 313(a) which permits an appeal to be taken as of right from a collateral order of a lower court." Memorandum and Order at No. GD 99-10264 dated December 6, 2000, pp. 1-2. The trial court specifically stated that its "court order permitting discovery *does not concern the merits of the lawsuit*." *Id.*, at p. 1 (emphasis added).

The Superior Court then quashed Doe's timely appeal as interlocutory. Despite the trial court's explicit finding that its discovery order did not concern the merits, the Superior Court held that the order failed to satisfy the separability prong of the collateral order doctrine because "the material subject to discovery is … intertwined with the facts necessary to support the cause of action." 2001 Pa. Super. 330, ¶ 6. In addition, the Superior Court failed to apply this Court's recent decision in *Ben v. Schwartz*, 556 Pa. 475, 729 A.2d 547 (1999), holding that discovery disputes involving statutory and executive privileges — much less constitutional ones — are separate from the merits and appealable as collateral orders so long as the legal analysis required to assess the privilege does not call upon the court to engage in analysis of the merits issues raised in the Complaint. The Superior Court also failed to consider petitioners' argument that the trial court's discovery order violates the First Amendment, ignoring decisions of the United States Supreme Court establishing a First Amendment right to communicate anonymously and limiting state defamation laws. The Superior Court denied a timely Application for Reargument on January 31, 2002.

Because this case involves important constitutional questions, some of which have never been addressed by this Court, Doe now seeks review.

REASONS RELIED UPON FOR ALLOWANCE OF APPEAL

Doe respectfully asks this Court to review the November 20, 2001 judgment of the Superior Court, which (1) quashed Doe's appeal as interlocutory, wrongly holding that the collateral order doctrine does not allow appellate review of a discovery order that would force disclosure of Doe's identity in violation of his First Amendment right to anonymity; and (2) failed to consider Doe's argument that the discovery order violates the First Amendment because it would disclose his identity before the public official plaintiff proved that she was economically harmed by Doe's allegedly defamatory criticism.

The effect of the Superior Court's decision in the present case is to deny any meaningful appellate review of Doe's First Amendment claims to anonymity, relegating Doe to an appeal only after final judgment, long after his anonymity has been destroyed in the trial court. This alone is a substantial infringement of Doe's Constitutional rights, and one with which the trial court in this case plainly disagreed. As another trial court also has recognized, "[w]hen an individual wishes to protect their First Amendment right to speak anonymously, he or she must be entitled to vindicate that right without disclosing their identity." *Doe v. 2TheMart.Com, Inc.*, 140 F. Supp. 2d 1088, 1091 n.2 (W.D. Wash. 2001).[4]

I. The Superior Court Disregarded The Controlling Authority Of This Court's Decision in *Ben v. Schwartz,* 556 Pa. 475, 729 A.2d 547 (1999).

Doe's appeal to the Superior Court of Pennsylvania, seeking to vindicate and preserve his Constitutional right to anonymous speech, was quashed as "interlocutory." Thus, the Superior Court determined that Doe could seek the aid of an appellate court only *after* his anonymity had been stripped away by court order – in other words, after his constitutional rights are irretrievably lost. The Superior Court reached this erroneous result by manifestly disregarding this Court's controlling decision in *Ben v. Schwartz*, 556 Pa. 475, 729 A.2d 547 (1999). *Ben v. Schwartz* held that discovery disputes involving statutory and executive privileges, much less constitutional ones, are separate from the merits, and thus may qualify as appealable collateral orders, even though the resolution may shed some light on the merits.

Ben v. Schwartz was a dental malpractice case in which the plaintiffs sought information from the Pennsylvania Bureau of Professional and Occupational Affairs concerning its investigation of one of the malpractice defendants. Like the Superior Court here, the Commonwealth Court had quashed an interlocutory appeal from the order compelling disclosure, finding that the order was not separable from the merits. The Commonwealth Court reasoned that the denial of disclosure could hobble the plaintiff's case, while granting the disclosure could materially aid it. This Court reversed, finding that the disclosure order was collateral. See also *Joe v. Prison Health Services, Inc*., 782 A.2d 24 (2001).

This Court in *Ben v. Schwartz* recognized that discovery orders are not rendered inseparable from the merits (and hence, are not rendered unappealable) simply because the discovery material "will certainly shed some light on" the merits. 729 A.2d at 551 (quoting *In re Ford Motor Co.*, 110 F.3d 954, 958 (3d Cir. 1997)). Instead, a discovery order is considered separable from the merits for collateral order purposes when "the issues of privilege raised by the [appellant] can be addressed without analysis of" the merits issues. 729 A.2d at 552. That is clearly the case here.

Here, it is not necessary to address the merits of Melvin's libel action in order to evaluate and give full appellate review to the legal question on appeal from the discovery order — whether Doe's identity is constitutionally protected from disclosure until Melvin proves economic harm. In contrast, the legal question on the merits will be whether Melvin has succeeded in proving all of the elements of defamation and therefore is entitled to recover.[5]

Of course, it is always true that the unavailability, due to privilege, of relevant information might make it impossible for a plaintiff to prove her case. *Ben*, 729 A.2d at 55 ("The subpoenaed information had the potential to determine one of the ultimate issues in the case"). Nevertheless, if the privilege (here, a constitutional right) can be decided without inquiry into the underlying merits, then the privilege against disclosure is deemed separable.

It would be one thing for Superior Court to declare that Doe has no right of anonymous political speech, or that his First Amendment right to it has not been breached. That determination can be further reviewed by appellate courts. But to say that Doe's assertion of the right of anonymous speech is only subject to appellate review *after* it has been forever and irretrievably stripped away from him, is to say that the constitutional right of anonymous criticism of government is a right that is never subject to appellate review. This would be error of constitutional magnitude. *See, e.g., James v. Kentucky*, 466 U.S. 341, 349 104 S. Ct. 1830, 1835 (1984) ("Whatever [traps] the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.") (Quoting *Davis v. Wechsler*, 263 U.S. 22, 24 44 S. Ct. 13, 14 (1923)).

This grave constitutional error is simply unnecessary, since this Court's opinion in *Ben v. Schwartz* points the clear path to appellate review *now*, the last chance that Doe will *ever* have for meaningful appellate review of his anonymity claim.

II. The Collateral Order In This Case Involves A Novel Issue of Constitutional Law About the First Amendment Right to Criticize A Public Official Anonymously on the Internet.

The Internet is a relatively new and powerful democratic forum in which anyone "can become a town crier with a voice that resonates farther than it could from any soapbox." *Reno v. ACLU*, 521 U.S. 844, 870, 117 S. Ct. 2329, 2344 (1997). The recent emergence and rapid growth of the Internet "has raised novel and complex legal issues and has challenged existing legal doctrine in many areas." *Doe v. 2TheMart.Com, Inc.*, 140 F. Supp. 1088, 1091 (W.D. Wash. 2001).[6] This case, and a growing number of similar cases across the country, involves a conflict between state defamation law and the fundamental First Amendment right to criticize a public official anonymously on the Internet. Melvin seeks Doe's identity through discovery in order to pursue her defamation claim; Doe opposes because Melvin has not made a showing sufficient to satisfy the exacting scrutiny required by the Constitution before anonymity is relinquished. This case presents vital and undecided issues regarding free speech on the Internet, and will impact literally millions of individuals who speak freely and anonymously on the Internet every day.

A. This Court Should Grant Review to Bring Pennsylvania's Defamation Law Into Compliance With the First Amendment Right of Anonymity

Though courts have long balanced defamation laws with the First Amendment, no court has

yet considered the need to modify defamation law to protect the right to criticize public officials anonymously. This question, however, must be considered against a constitutional backdrop that strongly protects Doe's anonymous, political speech, and strongly disfavors defamation suits brought by public officials. Thus, on one side of the scale, the United States Supreme Court has repeatedly recognized the speech-enhancing value of anonymous speech. As it recently reiterated, the right to communicate anonymously "exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation – and their ideas from suppression – at the hand of an intolerant society." *McIntyre v. Ohio Elections Commission,* 514 U.S. 334, 357, 115 S. Ct. 1511, 1524 (1995) (citation omitted) (striking down an Ohio law that forbade all anonymous campaign literature). "Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all." *Talley v. State of California,* 362 U.S. 60, 64, 80 S. Ct. 536, 538 (1960) (invalidating state law that prohibited anonymous handbills); *Buckley v. American Constitutional Law Foundation,* 525 U.S. 182, 197-99, 119 S. Ct. 636, 645-46 (1999).

The features of anonymous speech on the Internet have an *enhanced* claim to First Amendment protection. The Internet has been described as a "vast democratic for[um]," *Reno v. ACLU,* 521 U.S. at 868, 117 S. Ct. at 2343, which gives average Americans an unprecedented ability to join a worldwide discussion and debate, not just on issues of government and politics, but on a range of subjects "as diverse as human thought." *Id*., at 852, 117 S. Ct. at 2335. Anonymity is widespread and ingrained in Internet culture, and has greatly contributed to the "uninhibited, robust and wide-open" exchange of ideas through the medium. *2TheMart.Com, Inc*., 140 F. Supp. at 1093. Much valuable speech on the Internet simply would not take place if participants could not communicate anonymously.[7] Political discussion in particular frequently occurs anonymously.[8]

In addition, anonymous speech on the Internet, because of its inherently reduced persuasive force and the inherent opportunity of anyone criticized to respond immediately in the same medium, presents much less threat to reputation than traditional communications media. Yet because of the sheer volume of Internet communications, and the ability to trace them, the courts are beginning to experience a flood of libel cases brought by public figures against Internet "John Does." See *supra* at n. 2. In many of those cases, the actions are dismissed as soon as the defendant's identity is uncovered, suggesting that court facilities and processes are being abused for other, private purposes.[9]

On the other side of the scale, the Supreme Court has repeatedly reiterated that public figures have a substantially reduced right to redress for defamation because they "have voluntarily exposed themselves to increased risk of injury." *Gertz v. Robert Welch,* 418 U.S. 323, 344-45,94 S. Ct. 2997, 3010 (1974). In *New York Times v. Sullivan*, the Court held that a public figure plaintiff could not recover under a state defamation law *even for demonstrably false statements* unless the plaintiff could prove actual malice. *New York Times v. Sullivan,* 376 U.S. 254, 84 S. Ct. 710 (1964), (reversing defamation judgment for Montgomery Alabama commissioner against newspaper and black clergymen for statements in editorial advertisement about the civil rights movement). Under the actual malice rule, a court cannot impose defamation liability for merely negligent falsehoods, not because such falsehoods are valuable in and of themselves but because "erroneous statement is inevitable in a free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" 376 U.S. at 271-72, 84 S. Ct. at 721. Reduced defamation remedies for public figures express the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well

include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." *Sullivan*, 376 U.S. at 270, 84 S. Ct. at 721.

As demonstrated by the proceedings so far in this case, the actual malice rule is not well suited to protect the First Amendment right to anonymous criticism on the Internet. Specifically, in a defamation case, a defendant's anonymity ordinarily must be breached in order to litigate the question of actual malice because it requires an inquiry into defendant's state of mind. Thus, the actual malice rule provides no protection to defendants' right to speak *anonymously*, because its protection does not come into play until anonymity is already breached. Doe seeks review for this Court to determine how to provide the "breathing space" necessary to protect anonymity under the First Amendment.

B. This Court Should Grant Review To Consider A New Rule Requiring Public Officials To Prove Economic Harm Before They May Silence Anonymous Critics

This court should grant review because the lower courts failed to adopt the proper standard to protect Doe's core right to communicate anonymously. Though the trial court itself recognized the serious First Amendment implications of this case and others like it, its analysis fell short of constitutional requirements for at least two reasons: (1) the court incorrectly held that defendants in defamation cases are entitled to First Amendment protection only where it "do[es] not interfere with the underlying purposes of state tort law," 49 Pa. D.&C. 4th at 466; and (2) the court rejected Doe's argument that requiring proof of economic harm would provide the proper First Amendment protection. *Id.*, at 478.

First, the trial court stated the constitutional question exactly backward: the question in this case (and indeed in all cases in which the Constitution is invoked as a defense to a state law), is not whether a constitutional right is inconsistent with the purpose of state law, but rather whether the state law as applied is inconsistent with the Constitution. *New York Times v. Sullivan* makes that clear: "[L]ibel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." 376 U.S. at 269, 84 S. Ct. at 720. In *Sullivan*, the Supreme Court's scrutiny led to the adoption of the "actual malice" rule, which certainly interfered with Alabama's intent to allow recovery for *all* false and defamatory statements. Because the application of defamation law in this case threatens the right to communicate anonymously, the First Amendment standard it must satisfy is "exacting scrutiny." *McIntyre*, 514 U.S. at 347.[10] The trial court in this case failed to apply that standard.

Second, the trial court dismissed without serious consideration Doe's argument that requiring proof of economic harm before disclosing identity would satisfy First Amendment scrutiny. Such proof has historically been required in cases of slander other than those classified as slander *per se*.[11] *E.g.*, Restatement of Torts 2d §575. In slander cases, a requirement of economic harm served to identify the serious cases worthy of legal attention in an otherwise potentially vast world of speech (oral communications) with reduced power to cause real injury, not unlike the modern Internet.

> If the case were classified as one of slander, on the other hand, judges usually started with a belief that the casual gossip usually involved would not be likely to cause harm of any permanent nature, if any at all, and for this reason, together with some reasons of historical importance, they refused to allow the plaintiff any recovery for mere slander unless he showed pecuniary loss, or some exceptional case.

Dobbs, Remedies, 511-512 (1973) (footnotes omitted). Internet speech, like oral communication, is by nature spontaneous and speculative. The economic harm rule has already withstood the test of time as a workable threshold requirement based on a well-recognized definition that is rooted in ancient law. It is thus appropriate to apply and extend this rule to Internet speech, especially where necessary to protect the core First Amendment right to criticize public officials anonymously.

Ultimately, Doe's argument is much like the defendants' argument in *New York Times v. Sullivan*. In that case, existing defamation law allowed a city commissioner to recover significant damages from black clergymen and a newspaper for their harsh criticism of the city's treatment of civil rights protestors. Recognizing that such cases were a disturbing trend that was stifling public debate in the civil rights-era south, the Supreme Court held that the First Amendment required a change in defamation law. The Court then broadened an existing rule — the actual malice rule – from a narrower class of cases, to all defamation cases involving public officials. See *Sullivan*, 376 U.S. at 279-283, 84 S. Ct. at 726. The instant case is part of a disturbing trend in which public officials and other public figures increasingly seek to squelch legitimate anonymous debate on the Internet, the most democratizing medium the world has yet seen. *ACLU v. Reno*, 929 F. Supp. 824, 881 (E.D. Pa. 1996) (Dalzell, J. concurring). To stop that trend, Doe asks this Court to consider extending an existing rule — requiring proof of economic harm in slander cases — to cases involving anonymous online speech.

Unlike the trial court, the Superior Court did not even recognize the constitutional implications of the discovery order. Doe urges this Court to accept review to remedy that constitutional error, and to decide how the recognized tension between the First Amendment and state libel laws should be resolved to protect the millions of individuals who speak anonymously about politics on the Internet every day. Quite simply, this Court should consider and decide when government power can be used to strip away the anonymity that has catalyzed this new discussion forum. Review is necessary because, "[u]nder our Constitution, anonymous pamphleteering" – whether in the town square or on the Internet – "is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent." *McIntyre*, 514 U.S. at 357, 115 S. Ct. at 1524.

CONCLUSION

Because Doe will forever relinquish his First Amendment right to anonymity unless this Court grants review now, Doe respectfully asks the Court to grant the petition for allowance of appeal.

Respectfully submitted,

By:_____

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(Footnotes)

[1] The Web page stated:

> Despite being prohibited from engaging in political activity, a couple of Judges have been keeping themselves pretty busy recently with politics. Judge Joan Orie Melvin has been lobbying the Ridge administration on behalf of a local attorney seeking the appointment by Governor Ridge to fill the vacancy on the Allegheny County Court of Common Pleas created by the mandatory retirement earlier this month of Judge Robert Dauer, now a Senior Judge. Dauer has also been actively pushing for this attorney's appointment. The last GS99 heard, this attorney is on the Governor's short-list of candidates. Let's hope that the Gov does the right thing and appoints somebody better qualified. Shame on Orie-Melvin and Dauer – this is exactly the kind of misconduct by our elected officials that the residents of Allegheny County will not stand for anymore … and a good reason why Judges should be held accountable for their actions and remembered at the polls at retention time.

R.23a.

This comment appeared, along with other discussions of local politics, on a privately maintained Internet Web Page identified only as "Grant Street '99," on facilities provided by America Online to its subscribers.

[2] There were only a handful of these cases in January of 1999. Today there are hundreds making their way through the courts, and often, into the news. In its amicus brief to the Superior Court in the present case, America Online ("AOL") stated that it received about 475 subpoenas seeking identity in the year 2000. *See AOL Brief at 2; see generally* Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 Duke L.J. 101 (Feb. 2000); *Phyllis Plitch, Defense Is Sought in Proliferating Suits Against Anonymous Online Posters*, Wall St. J. (Feb. 22, 2000), p. B9C; Mike France, *Free Speech on the Net? Not Quite*, Business Week (February 28, 2000), p. 93; Greg Miller, *'John Doe' Suits Threaten Internet Users' Anonymity*, Los Angeles Times (June 14, 2000), p. A1; see also *Dendrite International, Inc. v. John Doe No. 3*, 342 N.J. Super. 134, 151, 775 A.2d 756, 767 (2001); *Doe v. 2TheMart.Com, Inc.*, 140 F. Supp. 2d 1088, 1091 n.2 (W.D. Wash. 2001).

[3] Ross Kerber, *Ruling a Partial Win for Online Anonymity*, Boston Globe (Nov. 17, 2000), p. D2; *Judge's Online Critics Lose Their Anonymity*, The National Law Journal (Nov. 27, 2000), p. A7; Jeffrey Ghannam, *Libel Online: Suit Raises Issue of Protection for Anonymous Web Comments*, ABA Journal (March 2001), p. 28; Brian Krebbs, AOL Joins Fight To Protect Anonymity Online, Newsbytes (March 7, 2001).

[4] In addition, the Fifth U.S. Circuit Court of Appeals has held that the right of a party *plaintiff* to proceed anonymously raises an appropriate "collateral" issue for immediate appeal. *Doe v. Stegall*, 653 F.2d 180 (5th Cir. 1981); *Southern Methodist University Ass'n v. Wynne & Jaffe*, 599 F.2d 707 (5rh Cir. 1979).

[5] Doe does not appeal the denial of summary judgment, which sought judgment on the merits. If this Court reverses the denial of Doe's Motion for a Protective Order, and rules that Melvin cannot obtain identity until she proves economic harm, Doe will then seek reconsideration in the trial court of his summary judgment motion.

[6] A review of the history, the structure, and some of the triumphs of the Internet is contained in the Reproduced Record submitted to Superior Court, at R53a – R74a (affidavit of Sara Kiesler, Carnegie-Mellon University Professor of Human-Computer Interaction).

[7] "The ability to speak one's mind without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate. Furthermore, it permits persons to obtain information relevant to a sensitive or intimate condition without fear of embarrassment." . *Dendrite International, Inc. v. John Doe No. 3*, 342 N.J. Super. 134, 151, 775 A.2d 756, 767 (2001) (*quoting Columbia Ins. Co. v. Seescandy.Com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999).

[8] E.g., R.59a-61a; 85a-92a (Affidavit of Sara Kiesler, Ph.D., Professor of Human Computer Interaction, Carnegie-Mellon University) ("This is especially common when an individual or group is advocating changes in the criminal law (such as legalization of marijuana or abolition of the death penalty), or is critical of policies, local conditions or officials, or fears social censure (for example, in discussions of homosexuality). The Internet gives individuals the ability to say unpopular things without fear of reprisal from those in power.")

[9] See Greg Miller, *"John Doe" Suits Threaten Internet Users' Anonymity*, L.A. Times, June 14, 1999, at A1 ("[T]he growing volume of these suits — and the subsequent dropping of them in some cases after identities have been disclosed — makes some experts fear that the legal process is being abused by organizations seeking only to 'out' online foes.").

[10] At least ten state and lower federal courts have applied exacting scrutiny to protect various forms of anonymous political speech. *See, e.g., State v. Doe*, 61 S.W.3d 99 (Tex. Ct. App. 2001); *Washington Initiatives Now v. Ripple*, 213 F.3d 1132 (9th Cir. 2000); *Church of the American Knights of the Ku Klux Klan v. City of Erie*, 99 F. Supp. 2d 583 (W.D. Pa. 2000); *State v. Alaska Civil Liberties Union*, 978 P.2d 597 (Alaska 1999); *Yes for Life PAC v. Webster*, 74 F. Supp. 2d 37 (D. Me. 1999) and *Volle v. Webster*, 69 F. Supp. 2d 171 (D. Me. 1999); *American KKK v. City of Goshen*, 50 F. Supp. 2d 835 (N.D. Ind. 1999); *Arkansas Right to Life State PAC v. Butler*, 29 F. Supp. 2d 540 (W.D. Ark. 1998);

Stewart v. Taylor, 953 F. Supp. 1047 (S.D. Ind. 1997); *West Virginians for Life v. Smith*, 960 F. Supp. 1036 (S.D. W. Va. 1996); and *Virginia Society for Human Life v. Caldwell*, 906 F. Supp. 1071 (W.D. Va. 1995).

[11] In addition, several jurisdictions have already abolished presumed damages in all defamation, thereby requiring plaintiffs to prove they have suffered actual injury, although such injury does not necessarily require actual pecuniary loss. Jenkins v. Revolution Helicopter Corp., 925 S.W.2d 542, 544-45 (Mo. Ct. App. 1996); Ryan v. Herald Assoc., Inc., 152 Vt. 275, 283 (1989); Mareck v. John Hopkins University, 60 Md. App. 217, 223 (1984); Brown v. Presbyterian Healthcare Services, 101 F.3d 1324 (10th Cir. 1996).