STATE OF MICHIGAN
IN THE COURT OF APPEALS

FAZLUL SARKAR,

Plaintiff–Appellee,

vs.

JOHN and/or JANE DOE(S),

Defendant(s),

PUBPEER, LLC,

Appellant.
_____/

COA Case No. _____

Wayne County Circuit Court
Case No. 14-013099-CZ (Gibson, J.)

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PUBPEER'S APPLICATION FOR INTERLOCUTORY LEAVE TO APPEAL

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I. Order appealed from and basis of jurisdiction.

PubPeer, LLC seeks leave to appeal the March 26, 2015 order of the Wayne County Circuit Court (Gibson, J.) denying in part PubPeer's motion to quash the plaintiff's subpoena. The circuit court's order is attached as Exhibit O.

The circuit court's register of actions is attached as Exhibit Q. The transcript for the March 5 hearing on PubPeer's Motion to Quash is attached as Exhibit G. The transcript for the March 19 supplemental hearing on PubPeer's Motion to Quash has been ordered and will be submitted to the Court as Exhibit N.

This Court has jurisdiction to consider this application pursuant to MCR 7.203(B)(1) and MCR 7.205(A)(1) because PubPeer is seeking leave to appeal from an order of the circuit court that is not a final judgment appealable as of right, and because this application was filed within 21 days of the date of that order.

II. Introduction.

This case concerns the First Amendment right of scientists to discuss their peers' work anonymously on the Internet. That right has been threatened by an order from the circuit court requiring PubPeer, LLC—which operates a website devoted to anonymous, post-publication peer review of scientific publications—to identify one of the anonymous scientists on its site. Doing so would irreparably compromise that scientist's constitutionally guaranteed right to remain anonymous and therefore necessitates this Court's interlocutory review. If the order is not reviewed now, this Court would be effectively powerless after final judgment to redress the substantial harm threatened, because once the constitutional right to anonymity has been lost, it cannot be regained.

This case began when several anonymous scientists discovered what they believed to be anomalies in the research papers of Dr. Fazlul Sarkar, a prominent cancer scientist. They

reported those apparent anomalies—mainly similarities between images purporting to show the results of different experiments—on www.pubpeer.com, a website that PubPeer created for anonymous scientific discourse. The reports sparked an online discussion about those similarities and about the traditional system of pre-publication peer review that failed to detect them. Dr. Sarkar sued the anonymous commenters as Jane/John Doe defendants for defamation, arguing that they had falsely accused him of research misconduct. Even though not a single one of the comments on PubPeer's site alleged research misconduct or anything remotely approaching it, Dr. Sarkar obtained a subpoena requiring PubPeer to disclose the identities of its anonymous scientists so that his suit against them could proceed.

PubPeer moved to quash the subpoena based on the First Amendment's protection of the anonymity of its commenters, arguing that Dr. Sarkar could not make the preliminary showing of merit to his claims necessary to overcome that constitutional right. On the basis of this Court's decision in *Ghanam v Does*, 303 Mich App 522; 845 NW2d 128 (2014), the circuit court agreed and quashed Dr. Sarkar's subpoena with respect to all but a single comment on PubPeer's site.[1] It later ordered PubPeer to disclose to Dr. Sarkar, however, the identifying information associated with that single comment, subject to a protective order. It is the right to anonymity of the person who posted that single comment that is the subject of this appeal.

Notably, the court did *not* base its unmasking order on the content of that commenter's post on PubPeer. Indeed, it could not have done so under *Ghanam* because the post is entirely innocuous and incapable of defamatory meaning, as explained below. Instead, in an apparently unprecedented ruling, the court ordered the commenter unmasked because of its speculation that

[1] On March 11, Dr. Sarkar moved the circuit court to reconsider that ruling. That motion is still pending. On March 30, Dr. Sarkar filed an application for leave to appeal from the circuit court's March 9 order.

the commenter might *also* have sent an email to Dr. Sarkar's employer—Wayne State University—making defamatory allegations against him. The content of that email, and indeed its existence, is entirely a matter of speculation, however, because Dr. Sarkar has not pleaded any portion of it or otherwise identified its content at any point in this litigation.

The circuit court's disclosure order is unconstitutional for several independent reasons.

First, the order is unconstitutional because it requires PubPeer to unmask a commenter whose speech on PubPeer's site was lawful and constitutionally protected. This Court's precedents—specifically, *Ghanam* and *Thomas M Cooley Law Sch v Doe 1*, 300 Mich App 245; 833 NW2d 331 (2013)—permit the unmasking of only those anonymous speakers who have essentially forfeited their right to remain anonymous by publishing actionable defamation. To give effect to that protection, *Ghanam* and *Cooley* require defamation plaintiffs to demonstrate—before unmasking—that their claims would survive a motion for summary disposition under MCR 2.116(C)(8).

Dr. Sarkar cannot make that showing because the comment on PubPeer's site is incapable of defamatory meaning and, in any event, legally privileged as a fair report. The comment is incapable of defamatory meaning because it contains only two statements, neither of which is defamatory: (1) a statement that someone reported the anomalies in Dr. Sarkar's research papers to Wayne State University, and (2) a reproduction of Wayne State's email in response to the reporting of those anomalies. The comment suggests, at most, that the commenter agreed that there were anomalies in Dr. Sarkar's images and that they merited further investigation. There is nothing defamatory about those scientific observations, and Dr. Sarkar has, to his credit, appeared to abandon any claim that reporting scientific anomalies in a peer's work is defamatory. The comment is also legally privileged because it simply reproduces an email sent

by Wayne State University in response to an inquiry. Publication of such official statements is legally privileged as a fair report.

Second, the order is unconstitutional because the circuit court ordered unmasking on the basis of an entirely un-pleaded email. The court speculated that PubPeer's commenter had sent an email to Wayne State and that the email contained defamatory allegations. Hornbook Michigan law requires plaintiffs to plead libel with specificity "by identifying the exact language that the plaintiff alleges to be defamatory." *Cooley*, 300 Mich App at 262. Because Dr. Sarkar has never pleaded the text of the email or otherwise identified its content at any point during this litigation, his claim of defamation based upon it would not survive a motion under MCR 2.116(C)(8). Therefore, it would be unconstitutional to unmask PubPeer's commenter on the basis of that email.

The circuit court made two additional constitutional errors that present issues of first impression in this Court.

First, the court ordered the unmasking of someone responsible for concededly lawful speech (the PubPeer comment) based on speculation that the same individual was responsible for different speech in a different forum (the email to Wayne State). But neither *Ghanam* nor any other case considering the unmasking of anonymous speakers permits the unmasking of someone responsible for *lawful* speech to discover the identity of someone responsible for *unlawful* speech. Doing so would violate the First Amendment by burdening constitutionally protected expression. This Court should grant leave to clarify that constitutional limitation.

Second, the circuit court ordered unmasking without requiring Dr. Sarkar to substantiate his claim of defamation with a prima facie evidentiary showing. Although virtually every other jurisdiction that has considered the issue has imposed such a requirement as an essential

protection against the unwarranted unmasking of anonymous speakers, this Court declined to require that showing of the plaintiffs before it in *Cooley* and *Ghanam*. This case differs from *Cooley* and *Ghanam*, however, because PubPeer has submitted evidence from an expert in the field, and Dr. Sarkar has not come forward with any evidentiary showing of his own.

PubPeer hired a prominent expert in the forensic analysis of scientific images to examine the concerns raised by PubPeer's commenters. Dr. John Krueger, who performed such analyses for 20 years for the federal government's Office of Research Integrity and who pioneered the forensic tools used to compare scientific images, arrived at an emphatic conclusion: he agreed with every single comment he examined from PubPeer's site, concluding that there are similarities between the images in Dr. Sarkar's papers and that those similarities warrant further investigation.

Thus, even if Dr. Sarkar's complaint is *legally* adequate, this Court should require that Dr. Sarkar substantiate his claims with a prima facie *evidentiary* showing prior to unmasking, especially in light of Dr. Krueger's submission. Unless Dr. Sarkar can make such a showing, it is extraordinarily unlikely that he could prevail on his claim that the PubPeer commenter at issue defamed him, and it would therefore be fruitless to strip that commenter of his or her anonymity.

The circuit court erred in one final way: by failing to heed *Cooley*'s invitation to balance the anonymous speaker's First Amendment interests against the plaintiff's interests in unmasking. Here, that balance overwhelmingly favors maintaining the anonymity of PubPeer's commenters. The comments at issue are part of the scientific exchange necessary to scientific scholarship and progress. Because academic discourse inevitably involves—and requires—a competition among peers, courts have been loath to impose liability on the often-heated exchanges that result. To safeguard the breathing space required by the First Amendment, they

generally require academics unhappy with their critics to respond with data and debate rather than defamation suits.

This case exemplifies the importance of the First Amendment right to speak anonymously. PubPeer has created a forum for open discussion of the methodologies and conclusions of scientific research of great public importance. That discussion relies on anonymity. Absent it, scientists would be wary of debating the research of their colleagues and, more pressingly, the research of the dominant scientists in their field, for fear of endangering their employment. Shielded by that anonymity, however, PubPeer's commenters have reviewed the research of many scientists, and many have responded with a defense of their research or a course-correction in their work.[2] Dr. Sarkar has chosen a different path—one that attacks the anonymity that PubPeer provides and, in so doing, threatens free debate on scientific research. It is for this reason that PubPeer has moved to defend its users' rights and to preserve the platform it has created.

For these reasons, PubPeer respectfully requests that this Court grant interlocutory review of the circuit court's order of disclosure and reverse

III. Statement showing substantial harm by awaiting final judgment.

The circuit court has ordered PubPeer to disclose identifying information for one of its anonymous commenters. Allowing that order to be enforced without interlocutory review would cause substantial and irreparable harm.

[2] See, e.g., Ex C (Jollymore Aff ¶ 3 Appx B–C) (Cyranoski, *Acid-Bath Stem Cell Study Under Investigation*, Scientific American (February 18, 2014) http://www.scientificamerican.com/article/acid-bath-stem-cell-study-under-investigation (accessed December 6, 2014); Landau, *Scientist Wants to Withdraw Stem Cell Studies*, CNN (March 12, 2014) http://www.cnn.com/2014/03/12/health/stem-cell-study-doubts/index.html (accessed December 6, 2014)).

This appeal concerns the constitutional right to speak while remaining anonymous, a core right protected by the First Amendment. See *McIntyre v Ohio Elections Comm*, 514 US 334, 342; 115 S Ct 1511; 131 L Ed 2d 426 (1995) ("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."). The Supreme Court has long recognized that the denial of First Amendment rights, even for a moment, constitutes irreparable harm. See *Elrod v Burns*, 427 US 347, 373; 96 Ct 2673; 49 L Ed 2d 547 (1976).

The risk of irreparable harm in this case is particularly acute because once an anonymous speaker is unmasked, his or her anonymity cannot be restored. If PubPeer were compelled to comply with the circuit court's order to release the identifying information of its anonymous commenter, this Court would be effectively powerless to later correct that injustice. As the Maine Supreme Court noted in analogous circumstances, "disclosure of Doe's identity will strip Doe of anonymity, making a later appeal moot." *Fitch v Doe*, 869 A2d 722, 725 (Me, 2005); see also *Melvin v Doe*, 836 A2d 42, 50 (Pa, 2003) ("once Appellants' identities are disclosed, their First Amendment claim is irreparably lost as there are no means by which to later cure such disclosure"). And, as the Pennsylvania Supreme Court stated, "the constitutional right to anonymous free speech is a right deeply rooted in public policy that goes beyond this particular litigation, and . . . falls within the class of rights that are too important to be denied review." *Melvin*, 836 A2d at 50.

The potential harm from the unmasking of the commenter is not only irreparable—it is substantial. If this commenter is unmasked for making a non-defamatory statement, every scientist who has discussed a peer's work on PubPeer is potentially at risk of being unmasked. And once the commenter's identity is disclosed to the plaintiff, the commenter may face out-of-

court reprisal. Indeed, the use of defamation suits for the sole purpose of discovering the identities of one's critics so as to exact extrajudicial retribution is well documented.[3]

The disclosure order would, moreover, risk widespread harm to PubPeer's mission. The scientists who currently engage in peer review on PubPeer's site would be chilled from discussing the work of their peers if there were a risk that their identities would be disclosed in circumstances similar to those here. This is in fact the very reason PubPeer has permitted anonymous commentary: without it, scientists would have to risk their careers to offer candid public feedback on the research of their peers.

For these reasons, it is unsurprising that courts routinely permit interlocutory review of orders that would unmask anonymous speakers. The Michigan Court of Appeals did so in *Ghanam*, as have numerous other state courts. See, e.g., *Mortg Specialists, Inc v Implode-Explode Heavy Indus, Inc*, 999 A2d 184, 192 (NH, 2010); *Melvin*, 836 A2d at 50; *Fitch*, 869 A2d at 725; *Doe v Cahill*, 884 A2d 451, 454 (Del, 2005); *Indep Newspapers, Inc v Brodie*, 966 A2d 432, 456–57 (Md App, 2009); *Krinsky v Doe 6*, 72 Cal Rptr 3d 231, 234 (Cal App, 2008); *In re Does 1–10*, 242 SW3d 805, 811 (Tex App, 2007); *Mobilisa, Inc v Doe*, 170 P3d 712, 715 (Ariz App, 2007);

[3] See, e.g., *Swiger v Allegheny Energy*, 2006 WL 1409622, at *1 (ED Pa, May 19, 2006), aff'd, 540 F3d 179 (CA 3, 2008) (company represented by respected law firm in Philadelphia filed Doe lawsuit, obtained identity of employee who criticized it online, fired the employee, and dismissed the lawsuit without obtaining any judicial remedy other than the removal of anonymity); see also Paul Alan Levy, *Litigating Civil Subpoenas to Identify Anonymous Internet Speakers*, 37 Litigation, no. 3, 2011 at 3, <http://www.citizen.org/documents/litigating-civil-subpoenas-to-identify-anonymous-internet-apeakers-paul-alan-levy.pdf> ("I have always found it quite telling that when we enter an appearance to oppose efforts by plaintiffs seeking discovery into the identities of anonymous defendants, the most common response on the part of the plaintiffs' lawyers is either to drop the case or to file no opposition and hence allow the motion to quash to be granted. The second most common response is for the plaintiffs to simply argue that no proof should be required, without submitting evidence to support their claims just in case they should lose on their legal argument. What this tells me is that these plaintiffs sought discovery to identify their critics without having any real intention of going forward with a libel case.").

Immunomedics, Inc v Doe, 775 A2d 773,774 (NJ Super, 2001). Similarly, despite the federal "final order" rule, which strictly limits interlocutory appeals, see, e.g., *Mohawk Indus, Inc v Carpenter*, 558 US 100; 103 S Ct 599; 175 L Ed 2d 458 (2009), two federal appellate courts have granted review of orders to identify anonymous internet defendants. See *In re Anonymous Online Speakers*, 661 F3d 1168 (CA 9, 2011); *Arista Records, LLC v Doe 3*, 604 F3d 110, 119 (CA 2, 2010).

In the proceedings below, the plaintiff argued that a protective order restricting the ways in which the plaintiff could use the anonymous commenter's identity would somehow safeguard the commenter's anonymity. This fundamentally misunderstands anonymity. The primary purpose of the anonymity that PubPeer provides is to prevent researchers *such as the plaintiff* from learning the identities of their anonymous critics. Once the commenter's identifying information is disclosed to the plaintiff, the protection afforded by his or her anonymity is lost forever. Limiting the plaintiff's use of the commenter's identity would do nothing to prevent that principal harm. And the broader harm from even a disclosure restricted by a protective order would also be immediate. Whistleblowers within the scientific community would undoubtedly be chilled from voicing their concerns if they could not do so without risking disclosure of their identities to the very subjects of those concerns.

For these reasons, PubPeer and its commenter would suffer substantial and irreparable harm if PubPeer were forced to unmask its anonymous commenter before entry of a final judgment. Accordingly, this Court should grant leave to appeal.

IV. Questions presented for review.

May a defamation plaintiff compel the identification of an anonymous commenter on a website devoted to peer review of scientific publications:

1. Where the comment posted by that individual was not capable of defamatory meaning?

    i. The circuit court did not explicitly answer this question but implicitly said "yes."

    ii. Appellant PubPeer says "no."

2. Where the comment posted by that individual contained only a concededly fair and true report of an official response by Wayne State University to an inquiry?

    i. The circuit court did not explicitly answer this question but implicitly said "yes."

    ii. Appellant PubPeer says "no."

3. Based on speculation regarding an email allegedly sent by that same commenter, even though the plaintiff has not pleaded or otherwise identified a single word of that email?

    i. The circuit court said "yes."

    ii. Appellant PubPeer says "no."

4. Where the circuit court did not balance the First Amendment interests of the commenter against the plaintiff's interest in unmasking, as required by this Court's precedent?

    i. The circuit court did not explicitly answer this question but implicitly said "yes."

    ii. Appellant PubPeer says "no."

5. Where the balance of interests under the First Amendment favors maintaining the commenter's anonymity?

    i. The circuit court did not explicitly answer this question but implicitly said "yes."

    ii. Appellant PubPeer says "no."

6. Where the plaintiff has made no prima facie evidentiary showing to substantiate the complaint's allegation that the commenter's apparent claims—that images used in the plaintiff's papers were similar—were false?

    i. The circuit court did not explicitly answer this question but implicitly said "yes."

    ii. Appellant PubPeer says "no."

7. Where a prominent expert in forensic analysis of images used in scientific papers has, through an affidavit submitted in the circuit court, confirmed the commenter's apparent concern with the similarity between images used in the plaintiff's research papers and has stated that, as a former employee of the federal Office of Research Integrity, he would have recommended a further investigation of the plaintiff's research?

    i. The circuit court did not explicitly answer this question but implicitly said "yes."

    ii. Appellant PubPeer says "no."

V. Statement of facts and proceedings below.

Dr. Fazlul Sarkar is a prominent cancer researcher who has published over 430 original scientific articles in peer-reviewed journals and written more than 100 review articles and book chapters. Ex A at 3 (Compl ¶ 11). Around September 5, 2013, users on PubPeer's site began commenting on his papers. Ex B at 4 (Mot to Quash). On July 7, 2014, Dr. Sarkar's counsel sent a letter to PubPeer demanding that many of the comments be removed and that PubPeer disclose the identities of the commenters. Ex A at 22 (Compl ¶ 80). On July 10, PubPeer's moderators removed or edited several of the comments, including those pending review before being posted. *Id.*; Ex B at 4 (Mot to Quash). Dr. Sarkar filed this suit on October 9 against the anonymous commenters, claiming defamation and related torts. See Ex A (Compl). On October 13, Dr. Sarkar obtained a subpoena for any identifying information that PubPeer possesses for the anonymous commenters. See Ex C (Jollymore Aff ¶ 2 Appx A).

On December 10, 2014, PubPeer moved to quash the subpoena. See Ex B at 2–4 (Mot to Quash). The circuit court held a hearing on the motion to quash on March 5 and, as memorialized in a subsequent order, granted the motion with respect to every comment cited in Dr. Sarkar's complaint save one. See Ex H (Order Granting In Part Mot to Quash). The court ordered supplemental briefing and argument regarding that single comment, which is reproduced at paragraph 40(c) of the complaint. *Id.* On March 19, the circuit court held a hearing regarding

that comment and, as documented in a later order, denied the motion to quash with respect to that comment. See Ex O (Order Denying In Part Mot to Quash). The court ordered PubPeer to disclose any identifying information in its possession associated with the second comment reproduced in paragraph 40(c) of the complaint. *Id.* The court also signaled its intent to issue a protective order to limit the ways in which the plaintiff could use or further disclose that identifying information. *Id.*

On the day following the hearing, March 20, 2015, PubPeer moved the circuit court to stay its order pending PubPeer's efforts to obtain interlocutory review. See Ex P (Mot for Stay). The circuit court has not yet ruled on that motion. This application now seeks interlocutory review.

VI. Standard of review.

This Court reviews the denial of a motion to quash a subpoena for abuse of discretion. See *Cooley*, 300 Mich App at 263. "A trial court abuses its discretion when it chooses an outcome falling outside the range of reasonable and principled outcomes, or when it makes an error of law." *Id.* (footnotes omitted). Issues of constitutional law are reviewed de novo, and in First Amendment cases, the appellate court is "obligated to independently review the entire record to ensure that the lower court's judgment does not constitute a forbidden intrusion of the field of free expression." *Id*. at 263–64 (quotation marks omitted).

VII. Argument.

a. The First Amendment and this Court's precedents require defamation plaintiffs to make a preliminary showing of merit before they may unmask anonymous speakers.[4]

i. The First Amendment limits the compelled identification of anonymous internet speakers.[5]

The First Amendment protects the right to speak anonymously. *McIntyre*, 514 US at 341–43. The 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.* See also Jonathan Turley, *Registering Publius: The Supreme Court and the Right to Anonymity*, 2002 Cato Sup Ct Rev 57, 58 (2002) ("For the Framers and their contemporaries, anonymity was the deciding factor between whether their writings would produce a social exchange or a personal beating.").

As this Court has recognized, the "right to speak anonymously applies to those expressing views on the Internet." *Ghanam*, 303 Mich App at 533.

[4] PubPeer preserved this issue on pages 5–7 of its Motion to Quash (Ex G) and on pages 10–13 of its Supplemental Brief (Ex J).

[5] PubPeer preserved this issue on page 5 of its Motion to Quash (Ex G).

ii. *Ghanam* and *Cooley* require defamation plaintiffs to demonstrate at least the legal sufficiency of their claims before they may unmask anonymous speakers.[6]

Because the Constitution safeguards the right to speak anonymously, courts have uniformly held that plaintiffs seeking to unmask anonymous speakers through the subpoena power must make a preliminary showing of merit to their legal claims. See, e.g., *Ghanam*, 303 Mich App at 534–42 (discussing cases). Although the Michigan Supreme Court has yet to address this question, this Court has issued two opinions regarding the showing that must be made. See *id.*; *Cooley*, 300 Mich App at 256-63. Under *Ghanam* and *Cooley*, when a defamation plaintiff seeks to unmask an anonymous defendant, the court must first determine whether the complaint is legally sufficient. A legally sufficient defamation complaint is one that "claim[s] with specificity . . . the exact language that the plaintiff alleges to be defamatory," *Cooley*, 300 Mich App at 262, and that pleads statements that are "actually capable of defamatory meaning," *Ghanam*, 303 Mich App at 544. If a plaintiff does not meet these requirements, then the court must quash the subpoena that would unmask the anonymous speaker.

When the anonymous defendant is participating in the litigation, as in *Cooley*, that defendant may himself or herself initiate that review through a motion for summary disposition filed under MCR 2.116(C)(8). When the anonymous defendant is *not* participating—as here and in *Ghanam*—the Court must undertake that review of its own initiative or upon a motion filed by the third-party recipient of the subpoena in question. As the Court said in *Ghanam*, "[t]his evaluation is to be performed even if there is no pending motion for summary disposition before the court." 303 Mich App at 541.

[6] PubPeer preserved this issue on page 6 of its Motion to Quash (Ex G) and on pages 10–13 of its Supplemental Brief (Ex J).

Furthermore, this Court has held that, even if the plaintiff's complaint is legally adequate, courts may consider whether "the weight of the defendant's First Amendment rights" nonetheless constitutes "good cause" to refuse to enforce a subpoena that seeks to unmask the speaker. *Cooley*, 300 Mich App at 264–66.

iii. The vast majority of jurisdictions also require defamation plaintiffs to substantiate their allegations with evidence.[7]

Notably, four of the six judges in *Cooley* and *Ghanam* would have gone further. In addition to requiring that defamation plaintiffs defend the legal sufficiency of their complaint as pleaded before unmasking anonymous defendants, they would have joined the vast majority of jurisdictions that have considered the issue and have explicitly required that defamation plaintiffs substantiate their claims with actual evidence. See *id.* at 274 (Beckering, J., concurring in part and dissenting in part); *Ghanam*, 303 Mich App at 540 ("[W]e agree with the dissent in *Cooley* that it would have been preferable to also adopt the *Dendrite*/*Cahill* standard requiring a plaintiff to further produce evidence sufficient to survive a motion under MCR 2.116(C)(10)"). Those other jurisdictions—generally following either the New Jersey appellatecourt in *Dendrite Int'l, Inc v Doe*, 342 NJ Super 134; 775 A2d 756 (NJ App, 2001), or the Delaware Supreme Court in *Doe v Cahill*, 884 A2d 451 (Del, 2005)—have required defamation plaintiffs to put forward evidence establishing a prima facie case of defamation. See, e.g., Levy,*Developments in Dendrite*, 14 Fla Coastal L Rev 1, 10–16 (2012) (discussing "fairly unanimous" decisions of state appellate courts).

The Michigan Supreme Court has yet to address the standard that a defamation plaintiff must satisfy before unmasking an anonymous defendant.

[7] PubPeer preserved this issue on pages 6–7 of its Motion to Quash (Ex G).

b. The circuit court erred in ordering the unmasking of PubPeer's commenter because Dr. Sarkar's complaint is legally insufficient.[8]

The circuit court erred in denying PubPeer's motion to quash with respect to the sole commenter in question because his or her speech was not capable of defamatory meaning and because the circuit court based its order on an entirely un-pleaded email.

Under Michigan law, "[a] communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Smith v Anonymous Joint Enterprise*, 487 Mich 102, 113; 793 NW2d 533 (2010) (quotation marks omitted). To ultimately prevail on a claim of defamation, a plaintiff must establish four elements: (1) "a false and defamatory statement concerning the plaintiff," (2) unprivileged publication, (3) fault, and (4) harm. *Id.*

As this Court noted in *Cooley*, "several questions of law can be resolved on the pleadings alone, including: (1) whether a statement is capable of being defamatory, (2) the nature of the speaker and the level of constitutional protections afforded the statement, and (3) whether actual malice exists, if the level of fault the plaintiff must show is actual malice." 300 Mich App at 263. In other words, "[w]hether a statement is actually capable of defamatory meaning is a preliminary question of law for the court to decide." *Ghanam*, 303 Mich App at 544.

To be actionable, an allegedly defamatory statement "must be 'provable as false.'" *Ireland v Edwards*, 230 Mich App 607, 616; 584 NW2d 632 (1998), quoting *Milkovich v Lorain Journal Co*, 497 US 1, 17–20; 110 S Ct 2695; 111 L Ed 2d 1 (1990). It may not be mere "sarcas[m]," *Ghanam*, 303 Mich App at 550, "rhetorical hyperbole," *Greenbelt Co-op Publ'g Ass'n, Inc v Bresler*, 398 US 6, 14; 90 S Ct 1537; 26 L Ed 2d 6 (1970), or "[e]xaggerated

[8] PubPeer preserved this issue on pages 7–19 of its Motion to Quash (Ex G), pages 4–5 of its Reply Brief (Ex F), and on pages 2–6 of its Supplemental Brief (Ex J).

language," *Hodgins v Times Herald Co*, 169 Mich App 245, 254; 425 NW2d 522 (1988). And it must convey a materially false fact that a "reasonable fact-finder could conclude . . . implies a defamatory meaning." *Smith*, 487 Mich at 128.

The nature and venue of the statements is also critical: "Internet message boards and similar communication platforms are generally regarded as containing statements of pure opinion rather than statements or implications of actual, provable fact." *Ghanam*, 303 Mich App at 546–47. This is especially true for a forum like PubPeer, which hosts discussion of published articles. As the D.C. Circuit explained, "there is a long and rich history in our cultural and legal traditions of affording reviewers latitude to comment on literary and other works." *Moldea v New York Times Co*, 306 US App DC 1, 6; 22 F3d 310 (1994). "[W]hile a critic's latitude is not unlimited, he or she must be given the constitutional 'breathing space' appropriate to the genre." *Id.*

In addition to pleading actionable defamation, "[a] plaintiff must also comply with constitutional requirements that depend on 'the public- or private-figure status of the plaintiff, the media or nonmedia status of the defendant, and the public or private character of the speech.'" *Cooley*, 300 Mich App at 262 (internal citation removed). Here, Dr. Sarkar is a limited-purpose public figure, and the commenters' discussion of the scientific research that Dr. Sarkar chose to publish is speech on a matter of exceptional public concern. Dr. Sarkar is, by his own description, a renowned cancer researcher. See Ex A at 2–3 (Compl ¶¶ 6–12). His research is supported by a number of federal grants. *Id.* at 3 (Compl ¶ 12). He has published over 500 hundred articles, including many in prominent scientific journals. *Id.* (Compl ¶ 11). And his research has led to a number of clinical trials. *Id.* at 2–3 (Compl ¶¶ 9–10). Dr. Sarkar is on the editorial board of numerous scientific journals, and serves on both NIH and DOD study sections to review grant applications, both indicating he is a leader in his field. *Id.* at 3 (Compl ¶ 12). In

short, Dr. Sarkar has subjected his scientific research to public scrutiny. See *Gertz v Robert Welch, Inc*, 418 US 323, 342; 94 S Ct 2997; 41 L Ed 2d 789 (1974) ("Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classified as public figures . . . .").[9] Settled First Amendment jurisprudence "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *NY Times Co v. Sullivan*, 376 US 254, 280–81, 84 S Ct 710; 95 ALR2d 1412 (1964).

Moreover, because Dr. Sarkar's cancer research and any anomalies within it are "'subject[s] of general interest and of value and concern to the public,'" the PubPeer commenters' speech "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v Phelps*, 562 US 443; 131 S Ct 1207, 1211–15; 179 L Ed 2d 172 (2011) (internal citation removed).

i. The comment at issue cannot justify unmasking because it is not defamatory and because it is, in any event, legally privileged as a fair report.[10]

Under *Cooley* and *Ghanam*, Dr. Sarkar may not unmask PubPeer's commenter if his claim of defamation would not survive a motion for summary disposition under MCR 2.116(C)(8). For the reasons explained below, it would not.

[9] For these reasons, this case is significantly different from *Hutchinson v Proxmire*, in which the Supreme Court held that a scientist whose "published writings reach[ed] a relatively small category of professionals concerned with research in human behavior" was not a public figure. 443 US 111, 135; 99 S Ct 2675; 61 L Ed 2d 411 (1979).

[10] PubPeer preserved this issue on pages 18–19 of its Motion to Quash (Ex G) and on pages 2–6 of its Supplemental Brief (Ex J).

The sole comment at issue in this appeal is reproduced below (preceded by the question that prompted it):

> **Unregistered Submission:**
> (June 18th, 2014 4:51pm UTC)
>
> Has anybody reported this to the institute?
>
> **Unregistered Submission:**
> (June 18th, 2014 5:43pm UTC)
>
> Yes, in September and October 2013 the president of Wayne State University was informed several times.
>
> The Secretary to the Board of Governors, who is also Senior Executive Assistant to the President Wayne State University, wrote back on the 11th of November 2013:
>
> "Thank you for your e-mail, which I have forwarded to the appropriate individual within Wayne State University. As you are aware, scientific misconduct investigations are by their nature confidential, and Wayne would not be able to comment on whether an inquiry into your allegations is under way, or if so, what its status might be.
>
> "Thank you for bringing this matter to our attention."

Ex A at 10 (Compl ¶40(c)).

This comment is simply not capable of defamatory meaning. It responds to the earlier comment by claiming that "this" had been reported to Wayne State University, and then it reproduces the response from Wayne State. In the circuit court, Dr. Sarkar argued that the comment amounts to an allegation of research misconduct. But the comment says nothing of the sort. At most, it suggests that the commenter (1) agrees with the "this" referred to in the previous comment and (2) believes that the "this" warranted further investigation by Wayne State. Neither suggestion is capable of defamatory meaning.

First, read in context, the "this" refers to anomalies in images in Dr. Sarkar's papers that had been identified earlier in the comment thread—but expressing concern over those anomalies

is not defamatory. The comments in this specific thread are similar to most of the comments on PubPeer's site relating to Dr. Sarkar's work: they note a number of anomalies in the images appearing in Dr. Sarkar's papers and invite other readers to compare the images for themselves. See Ex C at 2–7 (Jollymore Aff ¶ 5). Nearly all of the anomalies noted consist of apparent similarities between images that purport to depict the results of different experiments. Here is the comment that initiated the comment thread at issue (note, in particular, the commenter's repeated invitation to compare various images):

> **Peer 1: (November 9th, 2013 5:30pm UTC)**
>
> Figure 1D
>
> UPPER Notch-1 panel: *please compare* NS of BxPC3 (lane 2 from left) with NS of HPAC (lane 4 from left) and CS of PANC-1 (lane 5 from left).
>
> Note also the vertical line and darker background on the left side of the CS band of PANC-1.
>
> LOWER Notch-1 panel: *please compare* CP of HPAC (lane 3 from left) with CP of PANC-1 (lane 5 from left). Also *compare* the CP band of BxPC3 (lane 1 from left) with the NP band of PANC-1 (lane 6 from left).
>
> Now, please FLIP HORIZONTALLY the entire LOWER Notch-1 band. Now *compare* the NP band of BxPC3 in the lower Notch1 panel (lane 2 from left in the original) with the CS of BxPC3 in the upper Notch-1 panel (first lane from left). Also *compare* the CP bands of HPAC and PANC-1 in the lower Notch-1 panel with the NS bands of BxPC3 and HPAC in the upper Notch-1 panel.
>
> Figure 5
>
> Cyclin D1 Panel: *please compare* the shape and position of the CS band of HPAC with the CS band of PANC-1 in the Cyclin D1 panel (upper).CDK2 Panel: please note the vertical line between the NS band of HPAC and CS band of PANC-1. Please note the box around the NS band of BxPC3 (magnify).
>
> Figure 6A, B and C
>
> *Please compare* the Rb bands in the three panels (A, B, and C). Compare the BxPC3 and HPAC bands in 6A and 6B, magnify and see the shapes and background, especially the small specks in the upper right corner of the second

> band (from left). Now, please FLIP HORIZONTALLY the RB bands in PANC-1 (panel C) and *compare* with the two other bands (BxPC3 and HPAC in panes A and B). Then, note the small specks in the upper right corner of the second band (from left).
>
> Figure 7E and Figure 8D
>
> *Please compare* the two Rb bands. But please increase the width of the Rb bands in Figure 8 and compare. Better seen in PowerPoint, magnify.

Id. (emphasis added).[11] Following that initial comment, other individuals highlighted similar anomalies in other papers. Then, as reproduced in paragraph 40(c) of the complaint, one commenter asked whether "anybody [had] reported *this* to the institute." Ex A at 10 (Compl ¶ 40(c)) (emphasis added).

In context, "this" quite obviously refers to the anomalies in Dr. Sarkar's images that had just been discussed. The commenter that the circuit court ordered unmasked then responded that "this" had been reported to Wayne State University. See *id.* ("Yes, in September and October 2013 the president of Wayne State University was informed several times."). That statement appears to convey agreement that there were similarities in Dr. Sarkar's images.

In the circuit court, Dr. Sarkar conceded that his claim of defamation is not based on the allegations of similarities in the images in his papers. See, e.g., Ex E at 1 (Pl Response to Mot to Quash) ("They frame their motion to try and fool this court into thinking this case is only about

[11] PubPeer provided the full comment thread in an affidavit submitted with its motion to quash. See Ex C at 2–7 (Jollymore Aff ¶ 5). The Court may consider the full thread for two reasons. First, the full context of the statement at issue is necessary to determine whether it is capable of defamatory meaning. See, e.g., *Gustin v Evening Press Co*, 172 Mich 311, 314; 137 NW 674 (1912) ("[A] publication must be considered as a whole."). Second, absent the full context, the comment cited in paragraph 40(c) of the complaint is facially deficient for an even more basic reason than explained above. Out of context, there is nothing in the comment to suggest that it even concerns Dr. Sarkar, as it must to be actionable. See *Smith*, 487 Mich at 113 ("a false and defamatory statement *concerning the plaintiff*" (emphasis added)). Similarly to *Ghanam*, however, the Court may consider the context now, even though not pleaded, "to determine whether allowing plaintiff to amend the complaint to contain the contents of these statements would be futile." 303 Mich App at 543.

whether scientific blots look alike, and that persons using their website should be allowed to say so."); *id.* at 9 ("This case, however, is not about blots."). But even if that were his claim, it would fail.

Claims of visual similarity are inherently subjective, not provably false. Whether two images look "similar" is entirely a matter of opinion, not of fact. Moreover, even if the claims of similarity conveyed provably false facts, they would still not be defamatory. They do not, as a matter of law, "'tend[] so to harm the reputation of [the plaintiff] as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.'" *Smith*, 487 Mich at 113 (citation omitted). That is because the fact of similarities between images does not suggest any impropriety. Instead, the identification of such anomalies is a core component of scientific discourse. Before relying on the work of their peers in arriving at their own conclusions or in designing their own future experiments, scientists debate the merit of the work. Courts are not the proper venue to mediate the terms of that debate. See *ONY, Inc v Cornerstone Therapeutics, Inc*, 720 F3d 490, 496 (CA 2, 2013) ("We conclude that, as a matter of law, statements of scientific conclusions about unsettled matters of scientific debate cannot give rise to liability for damages sounding in defamation.").

Second, the comment's apparent suggestion that the similarities merit further investigation is similarly incapable of defamatory meaning. Calls for investigation are inherently subjective, not provably false. As a matter of law, therefore, calling for an investigation is simply not defamatory. See *Ghanam*, 303 Mich App at 548 (finding internet comment containing statement "maybe I need to call the investigators?" to be "not defamatory as a matter of law"); *Haase v Schaeffer*, 122 Mich App 301, 305; 332 NW2d 423 (1982) ("I am here to investigate" does not "rise to the level of defamation."); *Varrenti v Gannett Co*, 33 Misc 3d 405, 412–13; 929

NYS2d 671 (2011) (holding that comments that "call[ed] for an investigation into the [police department's] practices" were "expressions of protected opinion").

In any event, there is an independent reason why Dr. Sarkar cannot show that the comment is defamatory: the comment is privileged under Michigan law as a fair and true report of a governmental record. See MCL § 600.2911(3). The comment recounts an apparently accurate official statement sent by Wayne State in response to an inquiry. Reporting that statement is privileged as the publication of a fair and true report. See *Kefgen v Davidson,* 241 Mich App 611, 626; 617 NW2d 351 (2000) (dismissing claim that defendant's distribution of an official letter was defamatory); *Northland Wheels Roller Skating Ctr, Inc v Detroit Free Press, Inc*, 213 Mich App 317, 327; 539 NW2d 774 (1995) (holding that fair reporting privilege extended to newspaper articles where authors represented "fair and true" reports of police records); *Stablein v. Schuster*, 183 Mich App 477, 482; 455 NW2d 315 (1990) (newspaper immune from liability for reporting contents of allegedly libelous letter read by school board official at official meeting); *McCracken v Evening News Ass'n*, 3 Mich App 32, 38–39; 141 NW2d 694 (1966).

For these reasons, the comment at issue is simply not actionable defamation. At most, it expressed concern over anomalies in scientific images and suggested that the anomalies warranted further investigation. Were scientists subject to civil liability for debating the merit of their peers' research or for demanding further investigation into their peers' work, scientific and academic debate would grind to a halt.

ii. The email sent to Wayne State cannot justify unmasking because the email is entirely un-pleaded.[12]

The circuit court ordered the unmasking of PubPeer's commenter based on speculation that the commenter may also have sent an email to Wayne State University making defamatory allegations against Dr. Sarkar. That decision was erroneous because the email in question has not been pleaded or otherwise identified at any point in this litigation. Dr. Sarkar has speculated that it exists because the response from Wayne State refers to such an email. Ex A at 10 (Compl ¶ 40(c)) ("Thank you for your e-mail . . . ."). But Dr. Sarkar has never quoted that email or alleged any of the supposedly defamatory text in it. This is fatal to his claim of defamation based on the email, and it is likewise fatal to his attempt to unmask anyone—let alone PubPeer's commenter—on the basis of it.

It is settled law in Michigan that "[a] plaintiff claiming defamation must plead a defamation claim with specificity by identifying the exact language that the plaintiff alleges to be defamatory." *Cooley*, 300 Mich App at 262; *Ledl v Quik Pik Food Stores, Inc*, 133 Mich App 583, 590; 349 NW2d 529 (1984) ("plaintiff's complaint [must] set forth . . . the defamatory words complained of"); *Wynn v Cole*, 68 Mich App 706, 713; 243 NW2d 923 (1976) (abrogated on other grounds) ("A complaint in libel must include the contents of the libelous statement . . . ."). In *Ghanam*, for example, this Court held that the "plaintiff's complaint is patently deficient by virtue of his failure to cite the actual complained-of statements in the complaint." 303 Mich App at 543.

Dr. Sarkar's complaint fails that basic requirement because it fails to plead the text of the hypothetical email. Moreover, the requirement of pleading the text with specificity is especially

[12] PubPeer preserved this issue on pages 8–12 of its Motion to Quash (Ex G) and on pages 4–5 of its Supplemental Brief (Ex J).

important in the context of anonymous speech, because it is what allows courts to review the legal sufficiency of a defamation claim *before* unmasking. Without the text of the alleged libel to examine, courts could not—as *Cooley* contemplated—test the sufficiency of the claim "on the pleadings alone." 300 Mich App at 263. Without that ability, a motion for summary disposition could not serve, again in the words of *Cooley*, as "an essential tool to protect First Amendment rights." *Id.* at 262.

For this reason alone, the circuit court erred in ordering the unmasking of PubPeer's commenter on the basis of an entirely un-pleaded email.

c. The circuit court erred in ordering the unmasking of PubPeer's commenter based on its speculation that the commenter was the same person who sent the email to Wayne State.[13]

Even if Dr. Sarkar had pleaded the text of the email to Wayne State, and even if that email were defamatory, it would not serve as a basis for unmasking PubPeer's commenter.

That is because the PubPeer comment and the email appeared in two different forums. The comment, of course, appeared on PubPeer's website, whereas the email was sent independently to Wayne State. Whatever defamatory speech may have been contained in the email, it did not appear on PubPeer's site. Thus, this case is unlike *Ghanam*, *Cooley*, and, it appears, every other unmasking case. In those cases, courts considered only whether to unmask an anonymous defendant in a particular forum based on whether his or her speech *in that forum* was defamatory. No court that PubPeer is aware of has considered whether it would be constitutional to unmask concededly *lawful* speech based on unlawful speech made elsewhere.

It would not be, and this Court should, in a ruling of first impression, clarify that constitutional limitation. The First Amendment does not permit Dr. Sarkar to unmask an

[13] PubPeer preserved this issue on pages 8–12 of its Motion to Quash (Ex G) and on pages 5–6 of its Supplemental Brief (Ex J).

anonymous comment on PubPeer's site unless *that comment* was defamatory or unlawful because, absent that showing, the commenter cannot be shown to have effectively forfeited his or her constitutional right to remain nameless. This flows directly from bedrock First Amendment principles. First Amendment rights may be restricted only to serve compelling interests and only through restrictions drawn as narrowly as possible. See, e.g., *Citizens United v Fed Election Comm'n*, 558 US 310, 340; 130 S Ct 876 (2010) ("Laws that burden . . . speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" (internal citation removed)). Allowing a defamation plaintiff to unmask an anonymous defendant satisfies those conditions, if at all, only because the speech of the anonymous defendant has been shown to be actionable defamation—that is, speech that is outside the bounds of First Amendment protection. The comment on PubPeer's site was lawful and, thus, has not lost its First Amendment protection, even if speech in another forum (i.e., the email) was unlawful. Thus, the commenter on PubPeer may not be unmasked. See *Carroll v President & Comm'rs of Princess Anne*, 393 US 175, 183–84; 89 S Ct 347; 21 L Ed 2d 325 (1968) ("An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and . . . the exact needs of the case.").

There is simply no legal precedent to support the contrary view: that speech lawfully made in one forum may be unmasked based on speech unlawfully made in other. This Court's decision in *Ghanam* is instructive. There, the Court separately examined statements made by each commenter to determine whether each was capable of a defamatory meaning and whether, therefore, each commenter should be unmasked or remain anonymous. See 303 Mich App at 547–50. It did not predicate an individual's right to anonymity in one forum on speech made in

another forum. Cf. *Dendrite* 342 NJ Super at 141 ("[T]he discovery of John Doe No. 3's identity largely turns on whether *his statements* were defamatory or not." (emphasis added)).

It is no answer to speculate, as did the circuit court, that PubPeer's commenter and the individual who sent the email to Wayne State may be one and the same person. As an initial matter, that logic would eviscerate the right to anonymity, because there will always be a possibility that a person's anonymous lawful critics are, in fact, the same as that person's anonymous unlawful critics. More importantly, it would violate the constitutional prohibition on penalizing constitutionally protected speech as a means of suppressing unlawful speech. As the Supreme Court has made clear: "The Government may not suppress lawful speech as the means to suppress unlawful speech." *Ashcroft v Free Speech Coal*, 535 US 234, 255; 122 S Ct 1389; 152 L Ed 2d 403 (2002); see also *Ex parte Lo*, 424 SW3d 10, 18 (Tex Crim App 2013), reh den (Mar. 19, 2014) ("The State may not justify restrictions on constitutionally *protected* speech on the basis that such restrictions are necessary to effectively suppress constitutionally *unprotected* speech . . . ."(emphasis in original)). The analogue is true here: the court may not order the unmasking of lawful speech in the punishment of unlawful speech.

d. The circuit court erred in not requiring Dr. Sarkar to substantiate his claims with evidence before unmasking PubPeer's commenter.[14]

Even if Dr. Sarkar could overcome the hurdles above to unmasking PubPeer's commenter, the circuit court erred in not requiring that he substantiate his claims with a prima facie evidentiary showing before unmasking PubPeer's commenter. The vast majority of jurisdictions to have considered this question require such evidence to safeguard the constitutional right to anonymity. See *Ghanam*, 303 Mich App at 537 ("Courts from other jurisdictions that have addressed these issues have mainly followed *Dendrite*, *Cahill*, or a

[14] PubPeer preserved this issue on pages 24–25 of its Motion to Quash (Ex G).

modified version of those standards."). Absent such a requirement, defamation plaintiffs could successfully overcome the right to anonymity through artfully pleaded complaints, even if they had no realistic chance of proving their case. This Court has yet to embrace that higher standard, although it has discussed it in both *Cooley* and *Ghanam*. If the Court concludes that Dr. Sarkar can otherwise satisfy the requirements of *Cooley* and *Ghanam*, then this case would present a unique circumstance—distinguishable from both of those cases—warranting adoption of the higher standard, which would require a prima facie evidentiary showing of merit before unmasking.

It is true that neither *Cooley* nor *Ghanam* required the plaintiffs before them to substantiate their claims with evidence. But neither case dealt with a situation like this one, in which: (1) an expert has essentially confirmed that the concerns articulated by the commenters on PubPeer's site are valid and merit further investigation; (2) the plaintiff thus has no prospect of success unless he can show that the expert's view is provably false and, in fact, false; and (3) the only evidence that could arguably approach that showing is the original data from the plaintiff's experiments, which are in his sole possession and yet not proffered by the plaintiff in support of his case.

It is in precisely such circumstances that the requirement embraced by nearly all courts to have considered the issue—that defamation plaintiffs seeking to unmask anonymous commenters substantiate their claims with evidence—is most needed to safeguard the right to anonymity.

e. The balance of the interests overwhelmingly favors maintaining the anonymity of PubPeer's commenter.[15]

Even if PubPeer's commenter had published speech capable of a defamatory meaning, this Court must "consider the weight of the defendant's First Amendment rights against the

[15] PubPeer preserved this issue on pages 20–24 of its Motion to Quash (Ex G).

plaintiff's discovery request" in determining whether to compel the disclosure of the commenter's identity. *Cooley*, 300 Mich App at 266. Here, the balance overwhelmingly favors maintaining anonymity, and the circuit court erred in failing to consider that balance at all.

There is more at stake in this case than the commenter's right to engage in protected speech anonymously. At stake is the freedom of academic discourse itself. The advancement of scientific knowledge depends on the ability to convey ideas without fear of retaliation. Particularly in the sciences, where hypotheses are rigorously tested through careful experimentation, open methodologies, and peer-reviewed publications, anonymity is a critical component of robust review. Indeed, some prominent science journals employ double-blind peer review—in other words, anonymous review—to ensure honest appraisals.[16] For all these reasons, courts have been "especially careful when applying defamation and related causes of action to academic works, because academic freedom is 'a special concern of the First Amendment.'" *ONY, Inc*, 720 F3d at 496, citing *Keyishian v Bd of Regents*, 385 US 589, 603; 87 S Ct 675; 17 L Ed 2d 629 (1967). To strip scientific commenters of anonymity based on claims as slight as those at issue here would subvert that system and impoverish the vigorous debate necessary to scientific progress.

The Court must balance these First Amendment interests against the strength of Dr. Sarkar's central claim, which is that commenters on PubPeer's site accused him of "research misconduct" despite never having used those words or anything comparable. His claim relies on a stream of inferences about the intent and motivations of scientists who, in reality, did little more than what scientists do every day: review the work of their peers and debate its merit.

[16] The NIH is piloting a program that accepts anonymously submitted grant applications to ensure objectivity of review. While the names of individuals on the reviewing committee are available to the applicants, the identities of the first and second reviewer are not disclosed. See, e.g., <http://www.nih.gov/news/health/dec2012/od-07.htm> (accessed December 9, 2014).

While the First Amendment issues in this case are weighty, Dr. Sarkar has only a slight interest in unmasking anonymous commenters in order to pursue his claim of defamation.

Under *Cooley*, the Court should balance these two competing interests. On the one hand is clear constitutional protection of academic discourse. On the other is the remote likelihood that Dr. Sarkar could show that anything PubPeer's commenter said was provably false and defamatory. The balance clearly favors quashing the subpoena.

VIII. Conclusion and relief requested.

For the reasons set forth above, PubPeer respectfully requests that this Court grant this application for leave to appeal and reverse the March 26, 2015 order denying in part PubPeer's motion to quash.

Respectfully submitted,

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