IN THE MICHIGAN COURT OF APPEALS
Consolidated Cases:

FAZLUL SARKAR, Plaintiff-Appellant, vs. **JOHN and/or JANE DOE(S)** Defendant(s)-Appellee(s), and **PUBPEER LLC,** Non-party Appellee.	COA Case No. 326667 Wayne Co. Circuit Court Case No. 14-013099-CZ Hon. Sheila Ann Gibson
FAZLUL SARKAR, Plaintiff-Appellee, vs. **JOHN and/or JANE DOE(S)** Defendant(s)-Appellee(s), and **PUBPEER LLC,** Non-party Appellant.	COA Case No. 326691 Wayne Co. Circuit Court Case No. 14-013099-CZ Hon. Sheila Ann Gibson

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BRIEF OF *AMICI CURIAE* GOOGLE INC. AND TWITTER, INC. IN SUPPORT OF PUBPEER, LLC

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QUESTIONS PRESENTED FOR REVIEW

Amici curiae will address the following issues raised by the parties:

1. May a plaintiff use a subpoena to unmask an anonymous online speaker without first obtaining judicial review to balance the plaintiff's need for the evidence against the speaker's First Amendment right to anonymous speech?

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

   Amici curiae say "no."

   Appellant/Appellee Sarkar says "yes."

   Appellant/Appellee PubPeer says "no."

2. Can a non-party communications provider be forced to identify an anonymous online speaker in response to a plaintiff's subpoena, where the plaintiff has produced no evidence to support a prima facie claim of actual harm?

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

   Amici curiae say "no."

   Appellant/Appellee Sarkar says "yes."

   Appellant/Appellee PubPeer says "no."

3. Does a non-party communications provider have an independent right to seek judicial review of a subpoena that seeks to identify an anonymous online speaker, regardless of whether that speaker has appeared in the case?

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

   Amici curiae say "yes."

   Appellant/Appellee Sarkar says "no."

   Appellant/Appellee PubPeer says "yes."

I. Statement of Interest of *Amici Curiae*

Google Inc. is a diversified technology company that offers a suite of web-based products and services, including Search, Gmail, Google+, Maps, YouTube, and Blogger. These services allow people in Michigan and around the world to communicate anonymously, pseudonymously, or under their own names, both publicly and privately. Freedom of expression is central to Google's mission, which is to "organize the world's information and make it universally accessible and useful." GOOGLE, *About Google* <http://www.google.com/about/> (accessed January 18, 2016). Twitter, Inc. is a global platform for public self-expression and conversation in real time. Together, Amici's services are the modern-day version of print newspapers, town halls, pamphlets, and public squares. Every day, people across the country use Google's and Twitter's services to engage in speech protected by the First Amendment.

The consolidated appeals in this case present two issues of concern to Amici. First, the parties have asked the Court to address the standard for unmasking an anonymous speaker on the Internet. Amici often receive non-party subpoenas seeking to unmask anonymous or pseudonymous users of their services. Amici have a strong interest in protecting their users' rights to speak anonymously (or pseudonymously), in preventing abuse of the judicial system, and in ensuring that speakers are not deprived of their First Amendment right to engage in lawful, anonymous speech. Second, this case presents the question of whether a non-party communications provider may challenge a subpoena that implicates a user's First Amendment rights. Google receives tens of thousands of requests for user information each year, each with the potential to implicate Google's statutory, contractual, and other obligations to its users. Similarly, Twitter receives thousands of requests for user information each year. Amici therefore have a strong interest in ensuring that they retain their own right to seek judicial review before being compelled to produce information about users.

Finally, while Amici have no knowledge of the facts of this case, PubPeer suggests that Google may yet receive a subpoena in this case seeking to unmask an anonymous Google email user.[1] See Appellant's Reply In Support of Application for Leave to Appeal, 1. Google therefore has a particularly strong interest in ensuring that the Court correctly sets out the law for this case.

II. Introduction

This case involves the First Amendment right to speak anonymously online. The defendant, PubPeer, LLC, operates a website devoted to post-publication peer review of scientific publications. Plaintiff, Dr. Fazlul Sarkar, seeks to identify the individual or individuals who used PubPeer to comment anonymously on alleged irregularities in some of Sarkar's academic papers. Sarkar sued the commenters and issued a subpoena to PubPeer directing it to reveal their identities. PubPeer moved to quash the subpoena, and the trial court quashed the subpoena as to all but one of the commenters.

The Court should reverse the trial court's decision not to fully quash the subpoena as to all of the commenters, and it should require that Sarkar make an evidentiary showing supporting his claims that the speech is unlawful before he can learn the identity of the PubPeer commenters. Requiring litigants such as Sarkar to present evidence in support of their claims is essential both to ensuring that the First Amendment right to speak anonymously is appropriately protected and to preventing litigants from abusing the legal system to retaliate against those whose opinions they dislike. For those reasons, federal and state courts throughout the country have increasingly adopted an evidentiary standard to protect anonymous speech. Michigan should follow their lead.

[1] There is no parallel no suggestion that Twitter may receive a subpoena in this case.

Additionally, the Court should hold that the circuit court did not err when it considered the First Amendment arguments raised by non-party PubPeer in its motion to quash Sarkar's subpoena. Sarkar's unsupported argument that a court cannot consider First Amendment concerns raised by a non-party subpoena recipient in cases where a Doe defendant has appeared is not the law, nor is it relevant to this case. Sarkar has sued multiple Doe defendants, only one of whom has made an appearance. Moreover, the First Amendment *requires* courts to conduct a First Amendment analysis prior to unmasking. In practice, Amici and similarly situated providers often receive subpoenas without any corresponding court order that addresses the user's First Amendment rights. If providers lack the ability to challenge such subpoenas on behalf of their users, the First Amendment right to anonymous speech will not have meaningful effect. Even where an anonymous commenter appears, he or she may lack the legal sophistication or resources to assert a First Amendment objection. In addition, subpoenas to providers such as PubPeer and Amici may implicate statutory, contractual, or business obligations, some of which may hinge on the validity or sufficiency of the subpoena. It would be unfair, and potentially violative of due process, to prevent a provider from raising its concerns with a court.

III. Statement of Facts, Statement of Jurisdiction, and Standard of Review

Amici adopt the Statement of Facts, Jurisdictional Statement, and Standard of Review set out in Appellant PubPeer's appellant brief in case number 326691, and the Counter-Statement of Facts and Standard of Review set out in Appellee PubPeer's appellee brief in case number 326667.

IV. Analysis

A. The Trial Court Erred in Failing to Adequately Protect the Defendant's Right to Anonymous Speech.

The trial court correctly quashed the subpoena as to most of the commenters at issue in this case, but it erred in ordering PubPeer to disclose the identity of one anonymous PubPeer user. In doing so, the court failed to apply the standards that the First Amendment imposes on subpoenas seeking to unmask anonymous speakers.

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

The First Amendment provides that Congress "shall make no law . . . abridging the freedom of speech." US Const Am I. The Fourteenth Amendment extends that protection to the States. See *Gitlow v New York*, 268 US 652, 666; 45 S Ct 625; 69 L Ed 1138 (1925). In addition, the Michigan Constitution provides that "[e]very person may freely speak, write, express and publish his views on all subjects." Const 1963, art 1, § 5. That provision guarantees speech rights coextensive with those protected by the First Amendment. *Thomas M. Cooley Law Sch v Doe*, 300 Mich App 245, 256; 833 NW2d 331 (2013).

The First Amendment right to free speech includes the right to speak anonymously. *Buckley v American Constitutional Law Foundation, Inc.*, 525 US 182; 119 S Ct 636; 142 L Ed 2d 599 (1999); *McIntyre v Ohio Elections Comm*, 514 US 334; 115 S Ct 1511; 131 L Ed 2d 426 (1995); *Talley v California*, 362 US 60; 80 S Ct 536; 4 L Ed 2d 559 (1960). As the United States Supreme Court has observed, "[u]nder our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent." *McIntyre*, 514 US at 357. Indeed, that tradition not only predated the Constitution but also played an important role in its adoption. See *id.* at 342; *id.* at 360 (Thomas, J., concurring) ("The essays in the Federalist Papers, published under the pseudonym of 'Publius,' are only the most

famous example of the outpouring of anonymous political writing that occurred during the ratification of the Constitution.").

Protecting anonymous speech is critical to ensuring that public debate is "uninhibited, robust, and wide-open." *NY Times Co. v Sullivan*, 376 US 254, 270; 84 S Ct 710; 11 L Ed 2d 686 (1964). Anonymity, the Supreme Court has explained, "is a shield from the tyranny of the majority," and it "exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society." *McIntyre*, 514 US at 357. The right to anonymity is protected whatever the speaker's motivation for remaining anonymous may be. *Id.* at 341–42. And it is applicable to speech about academic affairs, just as it is to political speech. See, e.g., *Keyishian v Bd of Regents*, 385 US 589, 603; 87 S Ct 675; 17 L Ed 2d 629 (1967) (noting that "academic freedom, which is of transcendent value to all of us," is a "special concern of the First Amendment").

The right to anonymous speech extends to online speech, which is analogous to traditional forms of anonymous communication. See, e.g., *Reno v ACLU*, 521 US 844, 853, 870; 117 S Ct 2329; 138 L Ed 2d 874 (1997) ("Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer."). Accordingly, Michigan courts have held that the "right to speak anonymously applies to those expressing views on the Internet." *Ghanam v Does*, 303 Mich App 522, 533; 845 NW 2d 128 (2014); *accord Cooley Law Sch*, 300 Mich App at 256 (citing *Reno v ACLU*, 521 U.S. at 870). Other courts applying the First Amendment have reached the same conclusion. See, e.g., *United States v Cassidy*, 814 F Supp 2d 574, 582–83 (D Md, 2011)

(holding that anonymous speech on Twitter is protected by the First Amendment). Indeed, the right to speak anonymously is even more important in the online context because "[t]he free exchange of ideas on the Internet is driven in large part by the ability of Internet users to communicate anonymously." *Doe v 2theMart.com Inc*, 140 F Supp 2d 1088, 1093 (WD Wash, 2001); accord *Columbia Ins Co v Seescandy.com*, 185 FRD 573, 578 (ND Cal, 1999). The power of the Internet and of Amici's services is that anyone, anywhere, has the platform and tools to exercise their right to speak, publish, and debate without fear of retaliation. It is that right that the Court should protect in this case.

The failure to protect anonymous speech from those seeking to silence opinions with which they disagree, particularly opinions voiced on the Internet, will significantly impair speech online. Without adequate legal protections in place, speakers, fearful that their identities will not remain private, will be dissuaded from using services such as Amici's to discuss politicized or controversial issues of public importance. Additionally, the risk of improper unmasking of anonymous users risks stifling innovation, to the detriment of the general public, which relies on services such as those provided by Amici, and which benefits from technological innovations. For example, Amici—and similarly situated service providers—may be hesitant to implement new features or technologies if they know that they will be exploited by litigants wishing to harass and silence those whose opinions they do not like.

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

State courts across the country have held that a heightened level of scrutiny applies when a civil litigant seeks civil discovery to unmask an anonymous speaker. The leading cases establishing that widely adopted standard of review are *Dendrite Int'l, Inc v Doe*, 342 NJ Super 134; 775 A2d 756 (NJ App, 2001), and *Doe v Cahill*, 884 A2d 451 (Del, 2005).

Dendrite involved an interlocutory appeal of a trial court order denying a plaintiff's request to conduct expedited discovery to ascertain the identity of an online speaker in a defamation action. The New Jersey appellate court held that determining whether to unmask an anonymous online speaker involves "striking a balance between the well-established First Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interests and reputation through the assertion of recognizable claims based on the actionable conduct of the anonymous . . . defendants." *Dendrite*, 342 NJ Super at 141. The court set guidelines for striking that balance, which include requiring the plaintiff to attempt to notify the speaker and also requiring these safeguards:

(1) The plaintiff must "identify and set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech." *Id.*.

(2) "The complaint and all information provided to the court should be carefully reviewed to determine whether plaintiff has set forth a prima facie cause of action . . . ." *Id.*

(3) In addition to establishing that the complaint could survive a motion to dismiss, "the plaintiff must produce sufficient evidence supporting each element of its cause of action, on a prima facie basis." *Id.*

(4) Finally, only if the other elements are met, "the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity." *Id.* at 141-42.

Five other state appellate courts have adopted this standard. See *Mobilisa, Inc v Doe*, 217 Ariz. 103; 170 P3d 712 (App, 2007); *In re Ind Newspapers v. Junior Achievement of Central Ind, Inc*, 963 NE2d 534 (Ind. App, 2012); *Indep Newspapers, Inc v Brodie*, 407 Md 415; 966 A2d 432 (App, 2009); *Mtg Specialists, Inc v Implode-Explode Heavy Indus, Inc*, 160 NH 227; 999 A2d 184 (2010); *Pilchesky v Gatelli*, 2011 Pa Super 3; 12 A3d 430 (2011).

Other state courts have adopted a modified version of the *Dendrite* standard, first espoused by the Delaware Supreme Court in *Cahill*. The *Cahill* test also requires that the

plaintiff attempt to notify the speaker, but it combines *Dendrite*'s elements into a single requirement that the court subject the plaintiff's complaint and supporting materials to a "summary judgment inquiry." *Cahill*, 884 A2d at 461. This test "subsume[s]" the elements of the *Dendrite* test, including the final balancing of the plaintiff's and the speaker's rights. *Id.* Courts in at least three other states and the District of Columbia have adopted this approach. See *Doe v Coleman*, 436 SW3d 207 (Ky App, 2014); *Krinsky v Doe*, 159 Cal App 4th 1154; 72 Cal Rptr 3d 231 (2008); *Solers, Inc v Doe*, 977 A2d 941 (DC App, 2009); *In re Does 1–10*, 242 SW3d 805 (Tex App, 2007).

Federal courts have repeatedly adopted the *Dendrite* or *Cahill* standard to ensure that First Amendment safeguards are established to protect anonymous speakers. See, e.g., *SaleHoo Group, Ltd v ABC Co*, 722 F Supp 2d 1210, 1214 (WD Wash, 2010) (adopting the *Dendrite* standard and finding that "[t]he case law, though still in development, has begun to coalesce around the basic framework of the test articulated in *Dendrite*"); *Sinclair v TubeSockTedD*, 596 F Supp 2d 128, 132 (DDC, 2009) (holding that plaintiff would lose under either the *Dendrite* or *Cahill* standard); *Doe v Individuals*, 561 F Supp 2d 249, 254-56 (D Conn, 2008) (requiring plaintiff to provide sufficient evidence to plead a *prima facie* cause of action to ensure that "plaintiffs do not use discovery to harass, intimidate or silence critics in the public forum") (internal quotation marks and citation omitted); *Highfields Capital Mgt, LP v Doe*, 385 F Supp 2d 969, 975 (ND Cal, 2005) (requiring plaintiff to show a "real evidentiary basis" that the defendant engaged in wrongdoing); see also *In re Anonymous Online Speakers*, 661 F3d 1168, 1176–77 (9th Cir, 2011) (holding that it was not clear error for a district court to apply the *Cahill* standard to unmasking an anonymous speaker).

Two states—Illinois and Washington—have not formally adopted the *Dendrite* or *Cahill* standard but have nonetheless required a heightened standard similar to *Dendrite* and *Cahill*. See *Stone v. Paddock Publications, Inc*, 2011 IL App 1st 093386; 356 Ill Dec 284, 292-93; 961 NE2d 380 (2011) (before a subpoena to unmask an anonymous speaker may issue, the litigant must file a verified petition for discovery that states with particularity facts supporting a cause of action for defamation; seeks only the identity of the potential defendant; and is subjected to a hearing to allow the court to determine whether the litigant has sufficiently stated a cause of action against the unnamed target) (citing *Maxon v Ottawa Publishing Co.*, 402 Ill App 3d 704; 341 Ill Dec 12; 929 NE2d 666 (2010)); *Thomson v Doe*, 189 Wash App 45; 356 P3d 727 (2015) (requiring plaintiff to provide notice to the anonymous speaker, present a *prima facie* case of defamation, and offer evidence in support). These courts, like the courts in *Dendrite* and *Cahill*, have recognized that allowing a subpoena to unmask an anonymous speaker without first evaluating the merits of the plaintiff's claims fails to protect the right to anonymous speech, as the First Amendment requires.

3. Protecting Speakers' Rights to Anonymity Requires that a Plaintiff Set Forth a Real Evidentiary Basis for Its Claims Prior to the Issuance of a Subpoena to Unmask.

In *Cooley Law School*, 300 Mich App at 264, the Court recognized that the First Amendment requires that, before a court orders an anonymous speaker unmasked, it must first evaluate a complaint under MCR 2.116(C)(8) to determine whether it states a claim on which relief may be granted. The Court's ruling was limited to those circumstances in which a Doe defendant has appeared in the case and in which the plaintiff has knowledge of the Doe's identity. The Court held that, under those conditions, "Michigan's procedures for a protective order, when combined with Michigan's procedures for summary disposition, adequately protect a defendant's First Amendment interests in anonymity." *Id.* The Court contemplated that the

Doe defendant who had appeared in the lawsuit would bring a motion under MCR 2.116(8). *Id.* at 268–69.

More recently, in *Ghanam*, 303 Mich App at 530, the Court held that a plaintiff seeking to uncover the identity of a defendant who has no notice of the lawsuit or who has not made an appearance must first "make reasonable efforts to notify the defendant of the lawsuit," and that the court must evaluate the complaint under MCR 2.116(C)(8), even when no motion is pending. The Court acknowledged that without notification and an evaluation under MCR 2.116(C)(8), the absent Doe would have no protections under the standard for summary disposition (because he would not be able to file a motion), and that any protections afforded by Michigan's procedures for protective orders would be contingent upon a third party asserting the Doe's First Amendment rights. *Id.* at 539–40.

As PubPeer has explained, the correct application of those standards should have led the trial court to quash all of the subpoenas at issue in this case. If the Court concludes otherwise, however, it should follow the overwhelming consensus in both state and federal courts that the First Amendment requires a plaintiff to set forth a real evidentiary basis for his claims before a court may allow the unmasking of an anonymous speaker.

Absent an evidentiary requirement, Michigan procedures will not sufficiently protect anonymous speech. Allowing a litigant to unmask an anonymous speaker simply on the basis of a well-pleaded complaint does not provide the protection the First Amendment requires. As decisions such as *Dendrite* and *Cahill* have recognized, an evidentiary showing is critical to ensuring that "plaintiffs do not use discovery to harass, intimidate or silence critics in the public forum." *Individuals*, 561 F Supp 2d at 254–56 (internal quotation marks and citation omitted). Merely requiring a plaintiff to survive a motion to dismiss—or, as one court put it, to "plead and

pray"—risks inviting litigants to creatively plead unsupportable claims to unmask their critics or those whose opinions they dislike. *Highfields Capital*, 385 F Supp 2d at 975. Once a speaker is exposed through a subpoena, litigants can drop their baseless lawsuits and seek retaliation against the speaker in other, extrajudicial ways. Such schemes threaten to render the right to anonymous speech illusory and chill free speech by dissuading people from using communications services anonymously or pseudonymously.

The Court in *Cooley Law School* recognized that such a scenario—which it characterized as an "extreme case"—might warrant imposition of an evidentiary standard. 300 Mich App at 269–70. In fact, that scenario is far from extreme. Rather, as PubPeer explained in its Application for Interlocutory Leave to Appeal (at 7–8, n. 3), the risk is well-documented and not merely hypothetical. The First Amendment requires an evidentiary standard in order to mitigate that risk.

Moreover, requiring the plaintiff to produce evidence *before* unmasking is critical because once the veil of anonymity is lost, it cannot be returned. A court that orders an anonymous speaker unmasked based on unsubstantiated claims that are later proven to be baseless will be unable to correct that injustice, or the subsequent chilling effect on free speech.

Sarkar's argument in this case demonstrates why an evidentiary standard is so critical to protecting speech. In his Application for Leave to Appeal, Sarkar argues that he has sufficiently pleaded various non-defamation torts, and that because these torts are not "based on the same statements" that provide the basis for his defamation claims (the majority of which the trial court rejected), they provide independent grounds for unmasking.[2] See Pl. Application for Leave for

[2] Of course, this contention is without merit. As PubPeer points out, each of Sarkar's tort claims is based on the same conduct that underlies his defamation claim, and therefore are subject to the same First Amendment restrictions. See Appellee's Brief in Case No. 326667, at 29 (citing *Hustler Magazine, Inc v Falwell*, 485 US 46, 56; 108 S Ct 876; 99 L Ed 2d 41 (1988)).

Appeal in Case No 326667, at 14. Even assuming that Sarkar is correct and these claims are sufficiently pled to withstand a motion for summary disposition, Sarkar has failed to demonstrate any connection between the ancillary torts and the speakers he seeks to unmask. Indeed, there may be none at all. If so, unmasking the anonymous commenters based on these claims would be both unconstitutional and pointless, as it would violate their First Amendment rights while bringing Sarkar no closer to justice. Requiring Sarkar and other similarly-situated plaintiffs to instead meet an evidentiary standard on both speech and ancillary tort claims will help ensure that mere speculation cannot be used to infringe a speaker's First Amendment right to anonymous speech.

Finally, the Court should hold that once a litigant has presented evidence of a *prima facie* cause of action, the trial court must "balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity." *Dendrite*, 342 NJ Super at 142. This is the final but necessary safeguard to protecting a speaker's constitutional right to engage in anonymous speech.

B. The First Amendment Requires That Non-Party Communications Providers Have an Independent Right to Test the Sufficiency of Subpoenas that Seek to Unmask Anonymous Speakers.

Sarkar argues that the trial court erred in granting the motion to quash with respect to any of the subpoenas. In his view, the appearance of one of the Doe defendants in the case means that the court should not have entertained PubPeer's First Amendment arguments. That is incorrect.

Michigan courts have recognized that a "showing [of merit] by the plaintiff and review by the trial court *are required* in order to balance the plaintiff's right to pursue a meritorious defamation claim against an anonymous critic's First Amendment rights." *Ghanam*, 303 Mich

App at 540 (emphasis added). That review is constitutionally mandated because it is necessary to ensure the protection of the anonymous speaker's First Amendment rights.

Courts have repeatedly acknowledged that when a non-party receives a subpoena that implicates the First Amendment rights of its users, it may object on behalf of the users. See, e.g., *In re Grand Jury Investigation of Possible Violation of 18 U.S.C. § 1461 et seq.*, 706 F Supp 2d 11, 17 n.3 (DDC, 2009) (company had standing to bring First Amendment challenge on behalf of its customers) (citing *Virginia v. American Booksellers Ass'n*, 484 US 383, 392-93; 108 S Ct 636; 98 L Ed 2d 782 (1988)); *In re Grand Jury Subpoena to Amazon.com Dated August 7, 2006*, 246 FRD 570, 572 (WD Wis, 2007) (permitting Amazon to move to quash and assert a First Amendment objection to a grand jury subpoena seeking the identity of thousands of book purchasers); see also *Digital Music News LLC v Superior Court*, 226 Cal App 4th 216, 228 n.12; 171 Cal Rptr 3d 799 (2014) (holding an online newsletter publisher had standing to assert commentators' constitutional rights); *Tattered Cover, Inc v City of Thornton*, 44 P.3d 1044, 1047 (Co., 2002) (holding that an "innocent bookseller [must] be afforded an opportunity for an adversarial hearing prior to execution of a search warrant seeking customer purchase records"); cf. *Music Group Macao Commercial Offshore Ltd v Does*, 82 F Supp 3d 979, 987 (ND Cal, 2015) (denying motion to compel Twitter to comply with subpoena identifying information of anonymous user, to which Twitter had objected on First Amendment grounds).

A non-party must retain such a right in order for the First Amendment protection of anonymous speech to be given meaningful effect online. Google, for example, receives tens of thousands of requests each year for user information, each with the potential to implicate the constitutional rights of Google users. See Google Transparency Report, *Requests for user information* <https://www.google.com/transparencyreport/userdata requests/US/> (accessed

January 18, 2016) (noting that in 2015 Google received over 21,000 requests from governmental agencies in the United States alone). Likewise, Twitter receives thousands of requests for user information each year. See Twitter Transparency Report, *Information Requests* <https://transparency.twitter.com/information-requests/2015/jan-jun> (accessed January 18, 2016) (noting that Twitter received over 4,000 requests from governmental agencies worldwide for the first half of 2015). Rarely do these requests come with court orders that state whether the court considered the First Amendment. If service providers like Amici were unable to object or ask the parties or court to consider the user's speech rights, the First Amendment right to anonymity would have little protection online. Cf. *Tattered Cover*, 44 P3d at 1060 ("Had it not been for Tattered Cover's steadfast stance, the zealousness of the City would have led to the disclosure of information that we ultimately conclude is constitutionally protected.").

Sarkar argues that procedural rules somehow preclude a circuit court from conducting the required constitutional analysis simply because an anonymous defendant has appeared in a case. See Pl. Brief on Appeal in Case No. 36667, at 6. But whether an anonymous user has appeared in a case should have no effect on the provider's right to assert a challenge. The user may not have sufficient time or resources to obtain competent legal counsel or prepare a comprehensive challenge to subpoena prior to the production deadline. Indeed, on an abbreviated timeline, an unsuspecting or legally unsophisticated speaker may neglect to assert a First Amendment objection altogether. But personal resources and legal acumen should have no bearing on an individual's substantive speech rights, and courts should not allow litigation gamesmanship to preclude a rigorous assessment of an attempt to infringe those rights.

In any event, even if a defendant has appeared and raised a competent First Amendment challenge to a subpoena, principles of due process require that the subpoena recipient retain its

own right to challenge the subpoena. The reason is simple: every request issued to a service provider such as Amici has the potential to affect the provider's statutory, contractual, and business obligations. For example, federal and state consumer protection laws require all businesses to honor representations made to consumers, including any promises regarding the collection and sharing of identifying information. See, e.g., 15 U.S.C. § 45 (prohibiting "unfair or deceptive" acts or practices). Additionally, all electronic communications service providers to the public are bound by the federal Electronic Communications Privacy Act ("ECPA") and its three component statutes, which may likewise restrict the disclosure of stored and real-time subscriber communications and identifying information. See, e.g., 18 U.S.C. § 2702(a)(1), (2) (prohibiting electronic communications service providers from disclosing the content of electronic communications); *Suzlon Energy Ltd v. Microsoft Corp*, 671 F3d 726, 730 (9th Cir., 2011) (Section 2702(a) prohibits private parties from using a civil discovery demand to obtain the content of communications from a service provider because that would "invade[] the specific interests that the [law] seeks to protect."). And when users communicate anonymously on Amici's services, they implicitly place their trust in Amici to respect their decisions and honor their First Amendment right to anonymous speech; other users of Amici's services, meanwhile, maintain an interest in receiving anonymous speech that would be chilled if not protected. See *Kleindienst v Mandel*, 408 US 753, 762–63; 92 S Ct 2576; 33 L Ed 2d 683 (1972) (discussing the constitutional right to "receive information and ideas," which is crucial to preserving "an uninhibited marketplace of ideas") (internal quotation marks and citations omitted). Accordingly, providers such as Amici have an independent interest in ensuring appropriate judicial review of requests to unmask their users.

Amici and similar service providers that receive a third-party subpoena seeking to unmask a user rarely, if ever, know whether the parties or court have had occasion to assess any of these concerns. And if Sarkar is permitted to proceed, Google may yet receive a subpoena in this case. See Appellant PubPeer's Reply In Support of Application for Leave to Appeal, 1. But without the ability to seek judicial review, Google would face an untenable situation in which any action—or inaction—could give rise to potential liability. Compliance could subject Google to potential litigation based on its contractual or statutory obligations, while also threatening to diminish consumer trust. On the other hand, non-compliance could subject Google to sanctions for failure to comply with discovery. See, e.g., MCR 2.305(B)(3) (a party seeking production of documents may file a motion to compel upon receiving an objection); MCR 2.313(A)(5) (after granting or denying a motion to compel, courts shall award costs to the prevailing party except where unjust); MCR 2.313(B)(1),(2) (allowing courts to order sanctions for persons that fail to comply with discovery requests). Due process therefore requires that Google have a right to object and ask the Court to test the sufficiency of a request for user information. See *Zinermon v Burch*, 494 US 113, 132; 110 S Ct 975; 108 L Ed 2d 100 (1990) (holding that due process generally requires a pre-deprivation hearing, where feasible, before property is taken). And where the sufficiency of a subpoena for user information hinges on the sufficiency of the claims alleged and an evidentiary showing in support of those claims, it is necessarily proper for the Court to test the complaint as well.

V. Conclusion

The Court should reverse the circuit court's March 9, 2015 order denying in part PubPeer's motion to quash and subsequent order directing PubPeer to unmask an anonymous user, and remand with instructions that the circuit court (a) require Sarkar to make a "real evidentiary showing" in support of his request and (b) if such a showing is made, conduct a First

Amendment balancing test before determining whether to quash the subpoena to PubPeer. The Court should also affirm the circuit court's March 9, 2015 order granting in part PubPeer's motion to quash and hold that the circuit court did not err in considering PubPeer's First Amendment arguments in so doing.

Dated: January 19, 2016

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