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PROTECTING ONLINE ANONYMITY AND PRESERVING REPUTATION THROUGH DUE PROCESS

Michael R. Baumrind*

INTRODUCTION

In August of 2008, a blogger[1] angered cover model Liskula Cohen by calling her, among other names, a "skank,"[2] an "old hag,"[3] and a "ho"[4] through the website Blogger.com.[5] Asserting that these comments were "malicious and untrue,"[6] Cohen, in turn, wanted to use New York's defamation laws to seek redress from the blogger.[7] At first glance, Cohen had everything she needed to at least file such a claim.[8] The statements were clearly published and likely without permission.[9] They were arguably false—Cohen would likely dispute that she is "sexually promiscuous"[10] or a "prostitute."[11] The one thing

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1. A blog, short for weblog, is a "website that displays in chronological order the postings by one or more individuals and usu[ally] has links to comments on specific postings." THE AMERICAN HERITAGE COLLEGE DICTIONARY 1554 (4th ed. 2007). A blogger is one who "write[s] entries in, add[s] material to, or maintain[s] a weblog." *Id.* at 155.

2. Maureen Dowd, *Stung by the Perfect Sting*, N.Y. TIMES, Aug. 26, 2009, at A23, *available at* 2009 WLNR 16617973.

3. *Id.*

4. *Id.*; Cohen v. Google, Inc., 887 N.Y.S.2d 424, 425–26 (N.Y. Sup. Ct. 2009).

5. *Cohen*, 887 N.Y.S.2d at 425–26.

6. *Id.*

7. *Id.*

8. "The elements of a cause of action for defamation 'are a false statement, published without privilege or authorization to a third-party, constituting fault as judged by, at a minimum, a negligence standard, and, it must either cause special harm or constitute defamation per se.'" *Id.* at 427–28 (quoting Dillon v. City of New York, 261 A.D.2d 34, 38 (N.Y. App. Div. 1999)).

9. *See Cohen*, 887 N.Y.S.2d at 425–26. Cohen's complaint alleged that the statements were published on the online website Blogger.com. *Id*.

10. *Cohen*, 887 N.Y.S.2d at 428. The *Cohen* court defines "skank" as "'one who is disgustingly foul or filthy and often considered sexually promiscuous.'" *Id.* (quoting THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1297 (4th ed. 2009), *available at* http://www.dictionary.reference.com/browse/skank).

11. *Id.* The anonymous blogger allegedly called Cohen a "ho," which the court defines as "'slang' for a 'prostitute.'" *Id.* (quoting THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 658 (4th ed. 2009), *available at* http://www.dictionaryreference.com/browse/ho).

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she did not have, however, was the anonymous blogger's identity.[12] Rather than ending her suit before it even began, Cohen did what a growing number of defamation plaintiffs do:[13] she sought a court order compelling the Internet Service Provider (ISP)[14] to release the anonymous blogger's identity.[15]

Eventually, the First Amendment could pose a problem for Cohen. She is a public figure, and the Supreme Court has held the First Amendment vigorously protects one's right to speak out against those in the public eye.[16] Unlike her private-plaintiff counterparts, during discovery Cohen will have to produce evidence to support that the alleged defamatory statements were false and that the defendant published them with "actual malice."[17] At this pre-action, pre-discovery stage of litigation, however, Cohen is not trying to prevail on her cause of action; she is trying to bring it in the first place. To do so, she needs to know whom to sue, and in some courts, this implicates another First Amendment concern: the right to anonymity.[18]

The Supreme Court has protected the right to anonymity in four seminal cases.[19] In each of these four cases, the Court invalidated

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12. *Id.* at 425.

13. *See, e.g.*, Doe v. Cahill, 884 A.2d 451, 455 (Del. 2005); Indep. Newspapers, Inc. v. Brodie, 966 A.2d 432, 434–38 (Ct. App. Md. 2009); Dendrite Int'l, Inc. v. Doe, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001); Greenbaum v. Google, Inc., 845 N.Y.S. 2d 695, 697 (N.Y. Sup. Ct. 2007); Lassa v. Rongstad, 718 N.W.2d 673, 679 (Wis. 2006).

14. An Internet Service Provider is an "organization that provides access to the Internet." PC Mag.com Encyclopedia, Definition of ISP, http://www.pcmag.com/encyclopedia_term/0,2542,t=ISP&i=45481,00.asp (last visited Mar. 2, 2011). In *Cohen*, Google, the parent company of Blogger.com was the ISP holding the identity of the anonymous blogger. *Cohen*, 887 N.Y.S.2d at 425. For a helpful discussion of the relationships among blogs, ISPs, email addresses, and identity, see *Indep. Newspapers, Inc.*, 966 A.2d at 435–38.

15. *Cohen*, 887 N.Y.S.2d at 425.

16. N.Y. Times v. Sullivan, 376 U.S. 254, 279–80 (1964) ("The constitutional guarantees require, we think, a federal rule that 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.").

17. *Id.* at 280.

18. *See generally* Lyrissa B. Lidsky, *Silencing John Doe: Defamation & Disclosure in Cyberspace*, 49 DUKE L.J. 855, 888–904 (2000). The U.S. Supreme Court has protected a right to anonymous speech in some circumstances. *Infra* Part II.

19. Watchtower Bible & Tract Soc'y, Inc. v. Village of Stratton, 536 U.S. 150 (2002); Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182 (1999); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995); Talley v. California, 362 U.S. 60 (1960).

laws requiring a speaker to identify himself prior to speaking.[20] Now, when anonymous online speech threatens an individual's reputation, trial courts have begun asking whether compelling disclosure of an online speaker's identity would violate this right.[21]

In *Doe v. Cahill*,[22] the Delaware Supreme Court articulated several concerns in this context:

> The possibility of losing anonymity in a future lawsuit could intimidate anonymous posters into self-censoring their comments or simply not commenting at all. A defamation plaintiff, particularly a public figure, obtains a very important form of relief by unmasking the identity of his anonymous critics. The revelation of identity of an anonymous speaker "may subject [the speaker] to ostracism for expressing unpopular ideas, invite retaliation from those who oppose her ideas or from those whom she criticizes, or simply give unwanted exposure to her mental processes."[23]

Based on these concerns, *Cahill* required that a plaintiff seeking to compel disclosure satisfy a heightened "summary judgment" standard before clearing this First Amendment hurdle.[24] This means that the plaintiff must not only state facts but also "introduce evidence creating a genuine issue of material fact for all elements of a defamation claim."[25]

In contrast to *Cahill*, the New York case of *Cohen v. Google, Inc.* relegated these First Amendment concerns to a footnote and

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20. *Watchtower*, 536 U.S. at 168–69; *Buckley*, 525 U.S. at 204; *McIntyre*, 514 U.S. at 357; *Talley*, 362 U.S. at 65–66; *see also infra* Part II.

21. *See infra* Part I.

22. Doe v. Cahill, 884 A.2d 451, 457 (Del. 2005).

23. *Id.* at 457 (alteration in original) (quoting Lidsky, *supra* note 18, at 890).

24. *Id.*; *see also* Mobilisa, Inc. v. Doe, 170 P.3d 712, 720 (Ariz. Ct. App. 2007); *Cahill*, 884 A.2d at 460; Solers, Inc. v. Doe, 977 A.2d 941, 954 (D.C. Ct. App. 2009); Reunion Indus., Inc. v. Doe, 80 Pa. D. & C.4th 449, 452 (C.P. Penn. 2007).

25. *Cahill*, 884 A.2d at 463. In *Cahill*, the Court acknowledged that certain elements of a defamation claim, such as "actual malice," are nearly impossible to support with evidence at this early stage of litigation, and therefore the defamation plaintiff need only introduce evidence on material facts within her control. *Id.* at 463–64; *accord Solers*, 977 A.2d at 954.

summarily dismissed them.[26] New York trial courts have consistently held that the generally applicable rules for pre-action discovery,[27] combined with the elements of a defamation suit, "appear to address the constitutional concerns."[28] Therefore, in New York, a plaintiff may be able to compel disclosure by merely showing a prima facie basis for a "meritorious cause of action and that the information sought is material and necessary to the actionable wrong."[29] For Cohen, this meant she needed only to state facts that "fairly indicate[d] [s]he ha[d] some cause of action against the adverse party."[30] She did not need to produce actual evidence of defamation.[31]

Currently, there is little consensus on how to approach this issue.[32] This Note begins in Part I by describing the varying approaches courts take when addressing whether to grant a subpoena for an anonymous blogger's identity in a defamation suit. Part I reveals that similar cases are handled inconsistently.

Part II demonstrates that until recently, the Supreme Court had not made clear whether a constitutional right to anonymous speech truly exists. Part II.A first considers the extent to which the U.S. Supreme Court seems to have recognized a constitutional right to anonymous speech in four cases: *Talley v. California*,[33] *McIntyre v. Ohio Elections Commission*,[34] *Buckley v. American Constitutional Law Foundation*,[35] and *Watchtower Bible and Tract Society of New York v. Village of Stratton*.[36] Based on these four cases, Part II.A recognizes that only in certain circumstances is anonymity deserving of heightened First Amendment scrutiny. Part II.B then addresses

26. *See* Cohen v. Google, Inc., 887 N.Y.S.2d 424, 427 n.5 (N.Y. Sup. Ct. 2009).
27. N.Y. C.P.L.R. 3102 (McKinney 2005).
28. *Cohen*, 887 N.Y.S.2d at 427 n.5 (listing cases relying on New York's generally applicable pre-action disclosure rule and showing that many refuse to compel identity disclosure under this rule).
29. *Id.* at 426–27 (quoting Uddin v. New York City Transit Auth., 810 N.Y.S.2d 198, 199 (App. Div. 2006)).
30. Stewart v. Socony Vacuum Oil Co., 163 N.Y.S.2d 22, 24 (N.Y. App. Div. 1957).
31. *See Cohen*, 887 N.Y.S.2d at 428–29.
32. *See infra* Part I.
33. Talley v. California, 362 U.S. 60 (1960).
34. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995).
35. Buckley v. Am. Constitutional Law Found., 525 U.S. 182 (1999).
36. Watchtower Bible & Tract Soc'y, Inc., 536 U.S. 150 (2002).

Doe v. Reed, decided in the summer of 2010.[37] In this case, the Supreme Court explained that when disclosure laws burden a fundamental right, such as the right to political speech, the proper level of review is known as exacting scrutiny.[38] Part II concludes by suggesting that, when no such right is implicated, the level of scrutiny is much lower.

Part III then brings these cases to bear on the issue of whether to compel an anonymous blogger's identity in an online defamation suit. Part III begins by viewing anonymity through a due process lens. After briefly defining procedural and substantive due process in Part III.A, Part III.B urges that the same concerns central to the four anonymous speech cases should drive the decision whether to compel disclosure. Part III.B concludes by demonstrating how courts can, and often do, apply due process on motions to compel disclosure of the identity of an anonymous speaker in a defamation suit. Rather than establishing a "different set of procedural rules for this single class of cases,"[39] as many courts have inconsistently done,[40] courts should universally employ due process.[41]

I. LEGAL TOOLS PROTECTING IDENTITY IN ONLINE DEFAMATION SUITS

Courts are far from a consensus on how to properly balance one's right to anonymously speak online with another's right to protect her reputation.[42] They differ primarily in the types of legal tools they employ when deciding whether to compel disclosure.[43] These tools include the procedural due process requirements of notice and an opportunity to be heard, pleading and evidentiary requirements, and a balancing test.

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37. Doe v. Reed, 130 S. Ct. 2811 (2010).
38. *Id.* at 2818.
39. Michael S. Vogel, *Unmasking "John Doe" Defendants: The Case Against Excessive Hand-Wringing Over Legal Standards*, 83 OR. L. REV. 795, 855 (2004).
40. *See infra* Part I.
41. *See infra* Part III.
42. *See infra* Part I.
43. *See infra* Part I.

A. Notice and an Opportunity to Be Heard

Courts may disagree on how strong an online defamation suit must be before compelling identity disclosure, but "even the most lax . . . require[], at a minimum, that the anonymous Internet speaker receive notice that his identity is the subject of a discovery request so that he may have the opportunity to challenge the subpoena in court."[44] This requirement addresses one obvious concern: whether the ISP has much of an incentive to zealously advocate for the anonymity of its client.[45] "An ISP's primary interest is in minimizing cost and maximizing profit, not in protecting anonymous speech or preventing the defamation of a company."[46] In *Cohen*, for example, Google presented "no substantive opposition"[47] to a petition to compel disclosure of the blogger's identity.[48]

This requirement of notice varies according to the circumstances. In many cases, the ISP will notify its client directly. For example, in the New York case of *Greenbaum v. Google, Inc.*,[49] Google, the ISP, agreed to notify an anonymous blogger of the petition to divulge the blogger's identity.[50] In other cases, the court requires that the plaintiff notify the defendant.[51] In *Doe v. Cahill*, the Delaware Supreme Court required that "to the extent reasonably practicable under the circumstances, the plaintiff must undertake efforts to notify the

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44. Anthony Ciolli, *Repression of the Organic Internet: Three Problems, Three Solutions*, 30 U. LA VERNE L. REV. 370, 378 (2009). For case examples see Mobilisa, Inc. v. Doe, 170 P.3d 712, 721 (Ariz. Ct. App. 2007); Doe v. Cahill, 884 A.2d 451, 460 (Del. 2005); and Dendrite Int'l, Inc. v. Doe, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001).

45. *See, e.g.*, Greenbaum v. Google, Inc., 845 N.Y.S. 2d 695, 698 (N.Y. Sup. Ct. 2007) ("'[ISP] Google leaves it to those people to come in and protect their own interests.' . . . It is thus clear that Google does not represent the interests of the people who anonymously operate blogs or anonymously make comments on blogs maintained on Google's website." (citation omitted)).

46. Orit Goldring and Antonia L. Hamblin, Note, *Think Before You Click: Online Anonymity Does Not Make Defamation Legal*, 20 HOFSTRA LAB. & EMP. L.J. 383, 396 (2003); *see also* David Sobel, *The Process That "John Doe" is Due: Addressing the Legal Challenge to Internet Anonymity*, 5 VA. J.L. & TECH. 3, 18–19 (2000).

47. Cohen v. Google, Inc., 887 N.Y.S.2d 424, 425 (N.Y. Sup. Ct. 2009).

48. As the court explained, "Google merely object[ed] that petitioner's request for relief [was] overbroad, vague, and ambiguously worded, and unduly burdensome." *Id.* at 425 n.1. However, once notified, the anonymous blogger herself argued for heightened review on First Amendment grounds. *Id.* at 427 n.5.

49. *Greenbaum*, 845 N.Y.S.2d 695.

50. *Id.* at 697. In addition, the court issued an order to the same effect. *Id.* at 697–98.

51. *See, e.g.*, Doe v. Cahill, 884 A.2d 451, 460 (Del. 2005).

anonymous poster that he is the subject of a subpoena or application for order of disclosure."[52] This may include posting an online message on the same website where the defendant allegedly posted defamatory statements.[53] Finally, courts often stay proceedings "to afford the anonymous defendant a reasonable opportunity to file and serve opposition to the discovery request."[54] Though they vary in approach, all courts require some degree of notice and an opportunity to be heard.[55]

B. Plaintiff's Pleadings and Evidence

One major point of diversion among courts is what standard to apply when determining whether a plaintiff has adequately presented a defamation suit against an anonymous speaker.[56] How strong of a case must the plaintiff have, and how can courts measure this strength? The *Cahill* court found it helpful to view this diversion as a spectrum.[57] At the low end of the spectrum is the oft-rebuked[58] "good faith standard,"[59] followed by the requirement of specificity in the pleadings[60] or sufficient facts to survive a motion to dismiss.[61] The

52. *Id.* at 460.

53. *Id.*; *accord* Dendrite Int'l, Inc. v. Doe, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001) (requiring defamation plaintiff to "post[] a message of notification of the identity discovery request to the anonymous user on the ISP's pertinent message board").

54. *Cahill*, 884 A.2d at 461.

55. *See supra* note 53 and accompanying text.

56. *See* Doe v. Individuals, 561 F. Supp. 2d 249, 255 (D. Conn. 2008) ("[T]he Court must consider whether the plaintiffs have made an adequate showing as to their claims against the anonymous defendant."); *infra* notes 66–71 and accompanying text.

57. Doe v. Cahill, 884 A.2d 451, 457 (Del. 2005).

58. *See, e.g.*, Krinsky v. Doe, 72 Cal. Rptr. 3d 231, 241 (Ct. App. Ca. 2008) ("[The good faith standard] offers no practical, reliable way to determine the plaintiff's good faith and leaves the speaker with little protection."); *Cahill*, 884 A.2d at 457 (reasoning the good faith standard is inadequate in part because "[p]laintiffs can often initially plead sufficient facts to meet the good faith test . . . even if the defamation claim is not very strong, or worse, if they do not intend to pursue the defamation action to a final decision"); Solers, Inc. v. Doe, 977 A.2d 941, 952 (D.C. Ct. App. 2009) ("[T]he 'good faith test' insufficiently protects a defendant's anonymity."); Indep. Newspapers, Inc. v. Brodie, 966 A.2d 432, 456 (Ct. App. Md. 2009) (rejecting good faith standard).

59. *In re* Subpoena Duces Tecum to America Online, Inc., 52 Va. Cir. 26, 37 (Va. Cir. Ct. 2000), *rev'd on other grounds sub nom.* America Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377 (Va. 2001).

60. *See, e.g.*, Dendrite Int'l, Inc. v. Doe, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001) ("The court shall also require the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech.").

spectrum tops off with a requirement that the plaintiff proffer the prima facie evidence sufficient to survive a summary judgment motion.[62]

Viewing these standards as a spectrum, however, may be misleading. Though the good faith standard seems easy to overcome, a court must still be convinced of the possibility of a meritorious cause of action.[63] This is not that different from requiring that a plaintiff show she could survive a motion to dismiss.[64] A court could hardly find a possible meritorious cause of action if the complaint, on its face, fails to state a claim.[65] Finally, the motion to dismiss standard naturally varies by jurisdiction,[66] with some requiring particularity in the pleadings[67] and others merely requiring notice of the cause of action.[68] Rather than looking at these standards as a spectrum, they should be viewed in light of the core question: what must the plaintiff show to convince the court that she has a meritorious cause of action that warrants the stripping of one's anonymity?

1. Good Faith v. Motion to Dismiss: Which Standard is More Rigorous?

In one of the first cases to broach the issue, a Virginia court applied a good faith standard to its decision that would, in effect, strip an Internet poster of his anonymity.[69] In *In re Subpoena Duces*

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61. Lassa v. Rongstad, 718 N.W.2d 673, 686–87 (Wis. 2006) ("On a motion to dismiss, the court must determine whether a communication is 'capable of a defamatory meaning.'" (quoting Starobin v. Northridge Lakes Dev. Co., 287 N.W.2d 747 (Wisc. 1980))).

62. *Cahill*, 884 A.2d 451, 462–63.

63. *See, e.g.*, *America Online*, 52 Va. Cir. at 37.

64. Generally, to survive a motion to dismiss, a plaintiff must allege all facts necessary to support a cognizable claim. 61A AM. JUR. 2D *Pleading* § 586 (1999).

65. *See, e.g.*, *America Online*, 52 Va. Cir. 26 at 37.

66. *Id.* at 36 ("What is sufficient to plead a prima facie case varies from state to state and, sometimes, from court to court.").

67. *See, e.g.*, Lassa v. Rongstad, 718 N.W.2d 673, 687 (Wis. 2006) (citing WIS. STAT § 802.03(6) (1994) (requiring particularity when pleading defamation in Wisconsin)).

68. *See* Doe v. Cahill, 884 A.2d 451, 458 (Del. 2005) ("Delaware is a notice pleading jurisdiction. Thus, for a complaint to survive a motion to dismiss, it need only give 'general notice of the claim asserted.'" (quoting Ramunno v. Cawley, 705 A.2d 1029, 1034 (Del. 1998))).

69. *See America Online*, 52 Va. Cir. 26 at 37.

Tecum to America Online, Inc, America Online refused to divulge the identity of an anonymous chatroom[70] participant who was potentially subject to a defamation suit.[71] The court considered requiring a prima facie showing of a valid defamation claim, but was uncomfortable with the fact that "a prima facie case varies from state to state and, sometimes, from court to court."[72] Instead, this appellate court attempted to provide *more* adequate protections of the First Amendment right to anonymity. The court held that before compelling identity disclosure, it must be "satisfied by the pleadings or evidence . . . that the party requesting the subpoena has a legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where suit was filed."[73] A court thus has discretion under this standard to determine "that a true, rather than perceived, cause of action may exist."[74]

At first glance, it seems accurate to place this good faith standard of *America Online* at the bottom of a spectrum outlined by *Cahill*.[75] Under a good faith standard, there is no explicit requirement that a plaintiff plead her case with particularity before a court will compel identity disclosure.[76] As *Cahill* explains, "[p]laintiffs can often initially plead sufficient facts to meet the good faith test . . . even if the defamation claim is not very strong, or worse, if they do not intend to pursue the defamation action to a final decision."[77]

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70. The court in *Independent Newspapers, Inc. v. Brodie*, 966 A.2d 432, 438 (Md. 2009), provides a helpful description of chatrooms: "A chatroom is another form of real-time communication over the Internet and constitutes a website that is set up to handle a group discussion." *Id.* at 438 (footnote omitted).

71. *America Online*, 52 Va. Cir. 26 at 27–28. The ISP America Online was faced with a subpoena duces tecum requiring that it divulge the anonymous chat room participant's identity and moved for a motion to quash that subpoena. *Id.*

72. *Id.* at 36. This issue was likely at the forefront of the judges' minds because the original defamation suit was filed in Indiana, but discovery was sought in Virginia. *Id.* at 27.

73. *Id.* at 37.

74. *Id.* at 36.

75. Doe v. Cahill, 884 A.2d 451, 457 (Del. 2005).

76. *Id.*

77. *Id.* In contrast, in *Lassa v. Rongstad*, the Supreme Court of Wisconsin adopted a motion to dismiss standard, in part because Wisconsin "require[s] particularity in the pleading of defamation claims." 718 N.W.2d 673, 687 (Wis. 2006). For *Lassa*, this meant the plaintiff had to allege specific statements that were "capable of a defamatory meaning." *Id. But see Cahill*, 884 A.2d 458 (refusing to adopt a motion to dismiss standard because Delaware, as a notice pleading jurisdiction, only requires

Requiring the plaintiff plead with particularity, on the other hand, is one way to ensure that the plaintiff is not merely trying to discover the speaker's identity so she can ostracize, retaliate, or harass the speaker.[78]

However, upon closer inspection, the good faith standard of *America Online* can actually be more rigorous. Compare the good faith standard to a typical motion to dismiss, where the court looks only to the pleadings.[79] The court in *Cohen* essentially applied a motion to dismiss standard.[80] There, the court held that New York's generally applicable pre-action disclosure law requiring "a strong showing that a cause of action exists,"[81] combined with the law of defamation, adequately addresses First Amendment concerns.[82] In both *Cohen* and *America Online* "the adequacy of merit rest[ed] within the sound discretion of the court."[83] However, in *Cohen*, the court relied solely on the facts as alleged and required no additional production of evidence.[84] In contrast, the *America Online* court, applying its good faith standard, required the plaintiff to go beyond the complaint and actually "produce the subject Internet postings, so that the court could better determine whether there is, in fact, a good faith basis."[85] It is clear that the label, *good faith* or *motion to*

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that plaintiff "give 'general notice of the claim asserted'" (quoting Ramunno v. Cawley, 705 A.2d 1029, 1034 (Del. 1998))).

78. *Cahill*, 884 A.2d at 457 (citing Lidsky, *supra* note 18 at 890).

79. *See* Rocker Mgmt. LLC v. John Does, No. MISC 03-003 3 CRB, 2003 U.S. Dist. LEXIS 16277, at *3, 8 (N.D. Cal. May 28, 2003) (applying a motion to dismiss standard and granting anonymous blogger's motion to quash a subpoena for his identity finding plaintiff failed to allege specific statements with a defamatory meaning). *But see* Columbia Ins. Co. v. SeesCandy.com, 185 F.R.D. 573, 579–80 (N.D. Cal. 1999) (purportedly applying a motion to dismiss standard but also requiring plaintiff to "make some showing that an act giving rise to civil liability actually occurred" and looking beyond the pleadings to the production of evidence to make its determination).

80. *See* Cohen v. Google, Inc., 887 N.Y.S.2d 424, 426 (N.Y. Sup. Ct. 2009).

81. *Id.* (quoting Siegel, Supplementary Practice Commentaries, McKinney's Cons. Laws of NY, 7B, CPLR 3102:5, 92).

82. *Id.* at 426–27 n.5.

83. *Id.* at 427 (quoting Matters of Peters v. Sotheby's, Inc., 821 N.Y.S.2d 61, 66 (N.Y. App. Div. 2006)).

84. *Id.*; *accord* Greenbaum v. Google, Inc., 845 N.Y.S.2d 695, 701 (N.Y. Sup. Ct. 2007) (denying plaintiff's request for identity disclosure of anonymous speakers finding that, based on the facts as alleged, plaintiff failed to demonstrate she had a meritorious cause of action).

85. *In re* Subpoena Duces Tecum to America Online, Inc., 52 Va. Cir. 26, 37 (Va. Cir. Ct. 2000), *rev'd on other grounds sub nom.* America Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377 (Va. 2001).

dismiss, does not in itself signify a level of review of a plaintiff's claim.[86]

2. Should Plaintiffs Present Actual Evidence Beyond Their Pleadings?

Regardless of the procedural label, many courts are more comfortable depriving a speaker of his anonymity when the plaintiff produces actual evidence of defamation.[87] As explained above, when applying a good faith standard, the *America Online* court required the production of evidence.[88] Similarly, in *Columbia Insurance Company v. Seescandy.com*,[89] a California federal court purportedly applied a motion to dismiss standard but, looking to outside evidence, required a showing of actual defamation.[90] However, as seen in *Cohen*, not all courts require evidence beyond the pleadings,[91] thus inviting the question: Should courts require extrinsic evidence? Several courts answer this question affirmatively.

In *Dendrite International, Inc. v. Doe*,[92] Dendrite, a Delaware corporation, filed a complaint against several fictitiously-named defendants arguing, among other things, that their comments on a Yahoo! bulletin board constituted defamation.[93] A New Jersey intermediate appeals court denied Dendrite's request to compel

86. *See* Vogel, *supra* note 48, at 857 (arguing that establishing a standard is potentially confusing); *see also* Solers, Inc. v. Doe, 977 A.2d 941, 954 (D.C. 2009) ("Procedural labels such as *prima facie* or 'summary judgment' may prove misleading . . . ."); Klehr Harrison Harvey Branzburg & Ellers, LLP v. JPA Dev., Inc., No. 0425 MARCH TERM 2004, 2006 WL 37020, at *8–9 (Pa.Com.Pl. Jan. 4, 2006) (rejecting the establishment of new standards or labels for compelling identity disclosure and instead relying on generally applicable rules of evidence).

87. *See, e.g.*, Doe v. Cahill, 884 A.2d 451, 462–63 (Del. 2005) (quoting AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., 871 A.2d 428, 444 (Del. 2005)); Dendrite Int'l, Inc. v. Doe, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001). *But see Klehr*, 2006 WL 37020, at *8–10 (relying on Pennsylvania's generally applicable Rule of Evidence 4011 which requires a good faith basis for discovery requests and holding that plaintiff overcame this burden and thus was entitled to the identity disclosure of the anonymous speakers).

88. *See supra* note 94 and accompanying text.

89. Columbia Ins. Co., v. Seescandy.com, 185 F.R.D. 573 (N.D. Cal. 1999).

90. *Id.* at 579–80.

91. Cohen v. Google, Inc., 887 N.Y.S.2d 424, 426–27 (N.Y. Sup. Ct. 2009).

92. *Dendrite*, 775 A.2d 756.

93. Dendrite Int'l, Inc. v. Doe, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001).

Yahoo! to divulge a defendant's identity.[94] When addressing the strength of Dendrite's defamation claim, the court held that a plaintiff must not only "identify and set forth the exact statements purportedly made by each anonymous poster"[95] but also "establish[] that its action can withstand a motion to dismiss."[96] To do so, "the plaintiff must produce sufficient *evidence* supporting each element of its cause of action, on a prima facie basis."[97] Dendrite could not show the statements were both defamatory and caused actual harm.[98] Thus, Dendrite could not overcome this burden, and the court did not compel disclosure.[99]

Similarly, in *Doe v. Cahill*,[100] an elected city councilman, Patrick Cahill, and his wife Julia sued an anonymous blogger over statements the blogger made on a website for citizens to voice "opinions about public issues."[101] Initially the Cahills sought and received a court order compelling Comcast, the owner of Doe's Internet Protocol (IP) address, to reveal the identity of the online bloggers.[102] The lower court applied a good faith standard and limited its analysis to "the initial pleadings and motion papers."[103] On appeal, the Delaware Supreme Court rejected the good faith standard. Instead, the court required the Cahills to support their "defamation claim with facts sufficient to defeat a summary judgment motion."[104] Because the Cahills failed to satisfy this summary judgment standard, the court

94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* (emphasis added).
98. *Id.*
99. *Id.* at 772.
100. Doe v. Cahill, 884 A.2d 451 (Del. 2005).
101. *Id.* at 454.
102. Cahill v. Doe, 879 A.2d 943, 945 (Del. Super. Ct. 2005), *rev'd sub nom.* Doe v. Cahill, 884 A.2d 451 (Del. 2005).
103. *Id.* at 954.
104. *Cahill*, 884 A.2d at 460. However, *Cahill* further held that "a public figure defamation plaintiff must only plead and prove facts with regard to elements of the claim that are within his control." *Id.* at 464. The court reasoned that it is "difficult, if not impossible" for a public figure "[w]ithout discovery of the defendant's identity, [to] satisfy[] [the] element" of actual malice, as required by the law of defamation. *Id.* at 464.

reversed, remanded, and instructed the lower court to dismiss the plaintiff's claim with prejudice.[105]

Whether labeled as a motion to dismiss standard with a heightened level of scrutiny or a summary judgment standard, both *Dendrite* and *Cahill* effectively required actual evidence of each element of defamation within the plaintiffs' control.[106] A California court addressing this issue found "it unnecessary and potentially confusing to attach a procedural label, whether summary judgment or motion to dismiss, to the showing required of a plaintiff seeking the identity of an anonymous speaker on the Internet."[107] Avoiding such labels, this court in *Krinsky v. Doe*[108] required that a defamation plaintiff "produce evidence of . . . those material facts that are accessible to her"[109] before the court will compel the disclosure of an anonymous blogger's identity. The court reversed a denial of an anonymous blogger's motion to quash a subpoena seeking his identity. It found that the alleged defamatory comments were non-actionable, "crude, satirical hyperbole."[110] Though articulated differently, *Dendrite*, *Cahill*, and *Krinsky* all required actual evidence of defamation before compelling disclosure.

C. An Additional Balancing Test

Some courts apply a balancing test and consider additional factors when determining whether to compel the identity disclosure of an anonymous speaker.[111] Such factors include whether the plaintiff

105. *Id.* at 468; *see also* Mobilisa, Inc. v. Doe, 170 P.3d 712, 720, 723–24 (Ariz. Ct. App. 2007) (adopting the summary judgment standard of *Cahill*, but finding that while the plaintiff alleged sufficient facts to overcome a summary judgment motion, the court failed to balance the interests of plaintiff and anonymous blogger).

106. *See supra* notes 101–114 and accompanying text.

107. Krinsky v. Doe, 72 Cal. Rptr. 3d 231, 244 (Cal. Ct. App. 2008).

108. *Id.*

109. *Id.* at 245.

110. *Id.* at 250. The allegedly defamatory statements directed towards corporate executives included "mega scum bag," "cockroach," and "boobs, losers and crooks." *Id.* at 235.

111. *See, e.g.*, Doe v. Individuals, 561 F. Supp. 2d 249, 257 (D. Conn. 2008); Mobilisa, Inc. v. Doe, 170 P.3d 712, 720–21 (Ariz. Ct. App. 2007); Indep. Newspapers, Inc. v. Brodie, 966 A.2d 432, 457 (Md. 2009); Dendrite Int'l, Inc. v. Doe, 775 A.2d 756, 760–61 (N.J. Super. Ct. App. Div. 2001).

truly needs the identity disclosed[112] and whether there is an alternative way to obtain the information.[113] The seminal case to invoke a balancing test is *Dendrite*. There a New Jersey appeals court held that even after the plaintiff presents evidence sufficient to support a prima facie cause of action, "the court must balance the defendant's First Amendment right of anonymous . . . speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed."[114] *Cahill*, on the other hand, declined to adopt such a balancing test, finding it "unnecessary."[115] The *Cahill* court reasoned that the balancing test "adds no protection above and beyond that of the summary judgment test and needlessly complicates the analysis."[116]

II. THE EXTENT OF THE CONSTITUTIONAL RIGHT TO ANONYMOUS SPEECH

Courts considering whether to compel the disclosure of a speaker's identity often bluntly assert that the First Amendment protects anonymity.[117] This conclusion is usually based on four Supreme

112. Doe v. Individuals, 561 F. Supp. 2d at 255; *In re* Subpoena Duces Tecum to America Online, Inc., 52 Va. Cir. 26, 37 (Va. Cir. Ct. 2000), *rev'd on other grounds sub nom.* America Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377 (Va. 2001).

113. Doe v. Individuals, 561 F. Supp. 2d at 255; *Mobilisa*, 170 P.3d at 720. At least one court has also considered "the subpoenaed party's expectation of privacy at the time the online material was posted." Doe v. Individuals, 561 F. Supp. 2d at 255 (citing Sony Music Entm't, Inc. v. Does One–Forty, 326 F. Supp.2d 556, 565 (S.D.N.Y. 2008)).

114. *Dendrite*, 775 A.2d at 760–61; *see also Indep. Newspapers*, 966 A.2d at 457 (adopting a balancing test); *Mobilisa*, 170 P.3d at 723–24 (same); Doe v. Individuals, 561 F. Supp. 2d at 257 (same).

115. Doe v. Cahill, 884 A.2d 451, 461 (Del. 2005). The court's application of heightened review was not explicitly based on the plaintiff's public-figure status. *See id.* However, applying this review naturally burdens public figures more than private plaintiffs. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (holding in defamation, public figures, unlike private ones, must prove falsity and actual malice).

116. *Cahill*, 884 A.2d at 461; *accord* Best Western Int'l, Inc. v. Doe, No. CV-06-1537-PHX-DGC, 2006 WL 2091695 at *4 (D. Ariz. Jul 25, 2006) (adopting the *Cahill* approach in an action involving breach of contract, breach of fiduciary duties, trademark infringement and other non-defamation causes of action); Reunion Indus., Inc. v. Doe, 80 Pa. D. & C.4th 449, 454–55 (C.P. Penn. 2007) (adopting *Cahill*'s summary judgment standard in a commercial disparagement action and not conducting a separate balancing test).

117. *See, e.g.*, Lassa v. Rongstad, 718 N.W.2d 673, 683 (Wis. 2006) ("[T]he decision to remain anonymous is an aspect of the freedom of speech protected by the First Amendment.") (citing McIntyre

Court cases: *Talley v. California*,[118] *McIntyre v. Ohio Elections Commission*,[119] *Buckley v. American Constitutional Law Foundation*,[120] and *Watchtower Bible & Tract Society of New York v. Village of Stratton*.[121] However, as Part II.A explains, these cases suggest that constitutional protection for anonymity is limited. Each case considered a law requiring disclosure as a prior condition on speech, and none were driven by a general right to anonymity.[122]

These four Supreme Court cases reveal that when state action burdens certain types of speech, courts should be vigilant—but how vigilant? Often, constitutional questions are determined by how closely a court decides to scrutinize state action.[123] Applying a low level of scrutiny to state action requires that a state exhibit a legitimate government reason for its actions and that its actions are rationally related to this reason.[124] Most laws are upheld under this standard, known as *rational basis*.[125] Heightened scrutiny, often

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v. Ohio Elections Comm'n, 514 U.S. 334, 342 (1995)); *Cahill*, 884 A.2d at 456 ("This [First Amendment] protection extends to anonymous internet speech."); Dendrite Int'l, Inc. v. Doe 775 A.2d 756, 765 (N.J. Super. Ct. App. Div. 2001) ("It is well-established that rights afforded by the First Amendment remain protected even when engaged in anonymously."); *see also* Victoria Ekstrand, *Unmasking Jane and John Doe: Online Anonymity and the First Amendment*, 8 COMM. L. & POL'Y 405, 409–13 (2003) (discussing cases); Vogel, *supra* note 48, at 824–31 (same).

118. Talley v. California, 362 U.S. 60 (1960).

119. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995).

120. Buckley v. Am. Constitutional Law Found., 525 U.S. 182 (1999).

121. Watchtower Bible & Tract Soc'y, Inc. 536 U.S. 150 (2002).

122. Vogel, *supra* note 48 at 824–32.

123. Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring) (acknowledging that strict scrutiny is often "strict in theory, but fatal in fact" (citation omitted)); Gerald Gunther, *The Supreme Court, 1971 Term - Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (recognizing that strict scrutiny was often considered "'strict' in theory and fatal in fact"). *But see* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 808–09, 812–13 (2006) (determining that there are many recent decisions applying strict scrutiny but upholding a law nonetheless).

124. *See, e.g.*, Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312–17 (1976) (applying rational basis review to a mandatory retirement age for police officers to find that state police officers over the age of fifty are not a suspect class and the state has a rational basis in public safety to justify its actions).

125. *See, e.g.*, *id.*; San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 54–57 (1973) (applying rational basis review and upholding a Texas public school funding formula despite its unequal distribution of funds); General Motors Corp. v. Tracy, 519 U.S. 278, 312 (1997) (upholding a sales tax exemption under rational basis review to find no equal protection violation because the State had a rational basis for its gas utility regulation); *see also* Gunther, *supra* note 133, at 18–19 (referring to the traditionally low bar of rational basis review). *But see generally* Winkler, *supra* note 133, at 808–09 (discussing several cases invalidating laws under what seems to be "rational basis with bite" (quoting

called *strict scrutiny*, requires the government to show that its reasons are compelling and its actions are narrowly tailored to further them.[126] Few laws can survive this level of review.[127] There are also various intermediate levels of scrutiny,[128] and it is here the Supreme Court found its answer. In the summer of 2010, in *Doe v. Reed*, the Supreme Court decided that when political speech is burdened by disclosure laws, *exacting scrutiny* is appropriate.[129] This decision makes it even clearer that although there may be compelling reasons to vigorously protect one's right to speak anonymously,[130] the First Amendment will only go so far.

A. Four Anonymous Speech Cases and the Fundamental Interests at Stake

1. Four Anonymous Speech Cases

The first time the Supreme Court seemed to expressly recognize a First Amendment protection of anonymity was in 1960 in *Talley v.*

Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny By Any Other Name*, 62 IND. L.J. 779 (1987))).

126. *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535, 541–42 (1942) (invalidating an Oklahoma law requiring the sterilization of individuals with three convictions finding it failed to stand up to strict scrutiny); *see generally* Winkler, *supra* note 133, at 798–802 (2006) (discussing the evolution of strict scrutiny).

127. Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1160 (2002) ("When a law burdens [a fundamental] right, it merely triggers strict scrutiny—which, as everyone knows, is almost always fatal."). *But see* Winkler, *supra* note 133, at 808–09 (discussing challenges to the "myth" that strict scrutiny is fatal in fact).

128. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976) (applying intermediate scrutiny and holding gender classification "must serve important governmental objectives and must be substantially related to achievement of those objectives"); Buckley v. Valeo, 424 U.S. 1, 64–65 (1976) (per curiam) (applying exacting scrutiny to a campaign finance disclosure law); *see also infra* Part II.B (discussing Doe v. Reed, 130 S. Ct. 2811 (2010)).

129. Doe v. Reed, 130 S. Ct. 2811, 2818 (2010) (clarifying that exacting scrutiny "requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest" (quoting Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 914 (2010)). Prior to this case, it was not clear that exacting scrutiny was anything different than strict scrutiny. *See* Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 214 (1998) (Thomas, J., concurring) (recognizing that although *Buckley v. Valeo* purportedly applied a strict scrutiny test, "its formulation . . . was more forgiving than the traditional understanding of that exacting standard").

130. *See* Lidsky, *supra* note 18, at 888–92. Lidsky points out that compelled disclosure "may subject the [speaker] to ostracism for expressing unpopular ideas, invite retaliation from those who oppose her ideas or from those whom she criticizes, or simply give unwanted exposure to her mental processes." *Id.* at 890.

California.[131] In *Talley*, the Court invalidated a Los Angeles city ordinance requiring that handbills[132] distributed in the city include the identity of those involved in its distribution.[133] The law on its face applied to "any hand-bill in any place under any circumstances."[134] Although the Supreme Court typically applies something less than strict scrutiny to content-neutral laws of general applicability such as this,[135] it seemed to apply heightened scrutiny here.[136] Its reasoning was based in part on the Los Angeles ordinance's sweeping nature.[137] The ordinance was not "limited to handbills whose content is 'obscene or offensive to public morals or that advocates unlawful conduct.'"[138] The Court expressly did "not pass on the validity of an ordinance limited to prevent these or any other supposed evils."[139] Further, the Court analogized this case to *Bates v. City of Little Rock*[140] and *NAACP v. Alabama* ex rel. *Patterson*,[141] both of which applied heightened scrutiny, reasoning that "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance."[142]

In 1995, the Court, in *McIntyre v. Ohio Elections Commission*, invalidated an Ohio statute that prohibited "the distribution of

131. Talley v. California, 362 U.S. 60 (1960); *see also*, Vogel, *supra* note 48, at 826. This was nearly 200 years after the Federalist papers, pseudonymously written articles in favor of the adoption of the Constitution. *Talley*, 362 U.S. at 65.

132. The Los Angeles ordinance defines handbills as "any hand-bill, dodger, commercial advertising circular, folder, booklet, letter, card, pamphlet, sheet, poster, sticker, banner, notice or other written, printed, sticker, banner, notice or other written, printed or painted matter calculated to attract attention of the public." L.A., CAL., CODE § 28, *quoted in* and *invalidated by Talley*, 362 U.S. at 64, 66 n.4.

133. *Talley*, 362 U.S. at 64.

134. *Id.* at 63 (quoting L.A., CAL., CODE §28.06).

135. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994) ("[R]egulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny . . . .").

136. *Talley*, 362 U.S.at 65 (analogizing to cases applying strict scrutiny to content-neutral laws because of their effect on the freedom to freely associate). Justice Harlan expressly applied strict scrutiny in his concurring opinion. *Talley*, 362 U.S. at 66 (Harlan, J., concurring).

137. *Id.* at 63.

138. *Id.* at 64.

139. *Id.*

140. Bates v. City of Little Rock, 361 U.S. 516, 527 (1960) (invalidating city tax ordinance because its requirement of membership disclosure violated the constitutional right to association).

141. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 466 (1958) (invalidating an order requiring the disclosure of members of the NAACP).

142. *Talley*, 362 U.S. at 65.

anonymous campaign literature."[143] After reiterating the importance of anonymity in American literary history, the Court asserted that the "interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure *as a condition of entry*."[144] This protection of anonymity, the Court reasoned, extends to the political realm.[145] Because "this case 'involve[d] a limitation on political expression [it was] subject to exacting scrutiny.'"[146] Under such heightened scrutiny, the Court invalidated Ohio's law.[147] The Court found that the government's purpose of deterring false statements, though "assuredly legitimate,"[148] failed to justify the law's "extremely broad prohibition."[149] It also reasoned that Ohio's anonymity ban did not "directly attack[] . . . election-related libel"[150] but rather was "merely a supplement"[151] to its libel law.

Three years later in *Buckley v. American Constitutional Law Foundation, Inc.*,[152] the Court upheld the invalidation of a Colorado election law requiring those circulating petitions to wear name-identifying badges.[153] The Court reasoned that "the First Amendment requires us to be vigilant in making . . . judgments, to guard against undue hindrances to political conversations and the exchange of ideas."[154] In a footnote, the Court asserted that its "decision is entirely in keeping with the 'now-settled approach' that state regulations 'impos[ing] "severe burdens" on speech . . . [must] be

143. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 336–37 (1995). The Ohio law applied only to publications "designed to promote the nomination or election or defeat of a candidate, or to promote the adoption or defeat of any issue, or to influence the voters of any election." OHIO REV. CODE ANN. § 3599.09(A) (1988), *invalidated by McIntyre*, 514 U.S. at 338, 357. The law also disallowed anonymous financing of such political communications. *Id.*

144. *McIntyre*, 514 U.S. at 342 (footnote omitted) (emphasis added).

145. *Id.* at 343. The Court details several historical examples of anonymity in political speech. *Id.* at 343 n.6.

146. *Id.* at 346 (quoting Meyer v. Grant, 486 U.S. 414, 420 (1988)).

147. *McIntyre*, 514 U.S. at 357.

148. *Id.* at 351.

149. *Id.* at 350–51.

150. *Id.* at 350 n.13.

151. *Id.*

152. Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182 (1999).

153. *Id.* at 200.

154. *Id.* at 192 (citing Meyer v. Grant, 486 U.S. 414, 421 (1988)).

narrowly tailored to serve a compelling state interest.'"[155] This language suggested the Court was employing strict scrutiny, the law's highest level of scrutiny.[156] The Court held that Colorado's badge requirement "discourages participation in the petition circulation process by forcing name identification without sufficient cause."[157] Finally, the Court found Colorado's disclosure requirement "no more than tenuously related to the substantial interests disclosure serves."[158]

In his concurring opinion in *Buckley*, Justice Thomas expressly adhered to a strict scrutiny analysis of Colorado's disclosure laws.[159] According to Justice Thomas:

> When considering the constitutionality of a state election regulation that restricts core political speech or imposes 'severe burdens' on speech or association, . . . the law [must] be narrowly tailored to serve a compelling state interest. But if the law imposes 'lesser burdens,' . . . the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.[160]

Justice Thomas argued that "restrictions on core political speech so plainly impose a 'severe burden.'"[161] He stated that the State's justification, to "help[] the public . . . identify, and the State . . . apprehend, petition circulators who perpetrate fraud . . . is not narrowly tailored."[162] Justice Thomas further argued that, although Colorado's requirement that paid circulators identify themselves by name fails to constitute a "severe burden,"[163] a "strict

155. *Id.* at 192 n.12 (quoting *Buckley*, 525 U.S. at 206 (Thomas, J., concurring)).
156. *See supra* notes 136–137 and accompanying text.
157. *Buckley*, 525 U.S. at 200.
158. *Id.* at 203–04 (1998). Those interests include providing a "control or check on domination of the initiative process by affluent special interest groups." *Id.* at 202.
159. *Id.* at 206 (Thomas, J., concurring).
160. *Id.*
161. *Id.* at 208.
162. *Id.* at 210.
163. *Buckley*, 525 U.S. at 212.

test"[164] was nonetheless warranted as the disclosure requirement "can seriously infringe on privacy of association and belief guaranteed by the First Amendment."[165] Under this strict test, Justice Thomas supported the invalidation of the paid circulator provision. He found that the "State's interest in informing the public of the financial interests behind an initiative proposal is not compelling during the petitioning stage."[166]

In 2002, the Supreme Court addressed anonymous speech in *Watchtower Bible and Tract Society of New York v. Village of Stratton*.[167] The Court considered a facial challenge to an ordinance requiring that all door-to-door advocates register and receive a permit prior to canvassing.[168] The Sixth Circuit upheld the ordinance applying intermediate scrutiny because the ordinance was content-neutral.[169] The Supreme Court reversed but found it unnecessary to determine what standard of review to apply.[170] The Court reasoned that "the breadth of speech affected by the ordinance and the nature of the regulation make it clear that the Court of Appeals erred in upholding it."[171] It held that the ordinance (1) swept too broadly "covering unpopular causes unrelated to commercial transactions or to any special interest in protecting the electoral process,"[172] (2) imposed "an objective burden on some speech of citizens holding religious or patriotic views,"[173] and (3) impeded spontaneous speech.[174] Furthermore, the ordinance was not "tailored" to preventing fraud, the asserted government interest.[175] In finding the

164. *Id.* at 212 (Thomas, J., concurring) (quoting Buckley v. Valeo, 424 U.S. 1, 66 (1976) (per curiam)).
165. *Id.*
166. *Id.* at 213 (Thomas, J., concurring).
167. Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton, 536 U.S. 150 (2002).
168. *Id.* at 153.
169. Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton, 240 F.3d 553, 560–61 (6th Cir., 2001), *rev'd*, 536 U.S. 150 (2002).
170. *Watchtower*, 536 U.S. at 164.
171. *Id.* The Court further asserted, "The mere fact that the ordinance covers so much speech raises constitutional concerns." *Id.* at 165.
172. *Id.* at 167.
173. *Id.*
174. *Watchtower*, 536 U.S. at 167.
175. *Id.* at 168.

ordinance unconstitutional, the Court seemed most offended by the requirement that "in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so."[176]

2. *Fundamental Interests*

In the four anonymous speech cases discussed above, the Supreme Court has revealed its First Amendment concerns when anonymity interests are at stake: preventing conditions on entering the marketplace of ideas,[177] protecting core political speech,[178] and avoiding a burden on one's right to freely associate.[179] Disclosure laws implicating one of these interests warrant some form of heightened scrutiny.[180]

a. *Preventing Conditions on Entering the Marketplace of Ideas*

Requiring identity disclosure as a condition to entry into the marketplace of ideas is a government action warranting heightened scrutiny.[181] Such action is considered a "prior restraint on anonymous

176. *Id.* at 166.

177. *See infra* notes 191–200 and accompanying text.

178. *See infra* notes 201–15 and accompanying text.

179. *See infra* notes 216–27 and accompanying text.

180. *See infra* Parts II.A.2 and II.B. Presumably, if such strong interests are not implicated, some lesser form of scrutiny is warranted. *See* Washington v. Glucksberg, 521 U.S. 702, 722 (1997) (reasoning that government action burdening non-fundamental rights must meet the lesser standard of being rationally related to a legitimate government purpose). In First Amendment jurisprudence, content-based regulations on speech generally receive strict scrutiny. Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116–18 (1991). However, defamation law seems to be based on the content of the speech and yet the "compelling state interest test is not employed in some contexts." Ronald K.L. Collins, *Foreword*: *To America's Tomorrow—Commerce, Communication, and the Future of Free Speech*, 41 LOY. L.A. L. REV. 1, 14–15 (2007). *See also* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 152 (1967) ("Thus some antithesis between freedom of speech and press and libel actions persists, for libel remains premised on the content of speech and limits the freedom of the publisher to express certain sentiments, at least without guaranteeing legal proof of their substantial accuracy."). Justice Harlan suggests this is because libel law is premised not on the content of the speech but on the conduct of the defendant. *Id.* at 153.

181. *Watchtower*, 536 U.S. at 150; Talley v. California, 362 U.S. 60, 65 (1960). *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 336 (1995); Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam) (applying exacting scrutiny to a campaign contribution disclosure law); *see also* Vogel, *supra* note 48, at 831.

speech,"[182] and the Supreme Court has treated it as an infringement on a fundamental right.[183]

In *Talley*, for example, the Court was concerned that the city's broad, content-neutral requirement of identity disclosure would deter individuals from entering peaceful discourse.[184] Similarly, in *Watchtower* the Court expressed concern over a "requirement of registration in order to make a public speech."[185] This prior restraint resulted in "a significant amount of spontaneous speech that is effectively banned."[186] The Court was even clearer in *McIntyre* when it condemned Ohio for "requiring disclosure as a condition of entry."[187] While common law defamation also has a similar effect of deterring some from entering public discourse,[188] the *McIntyre* Court acknowledged Ohio's legitimate use of defamation law to deter libelous speech.[189] It held, however, that prior restraint laws failing heightened scrutiny are unacceptable.[190]

b. Protecting Core Political Speech

In *Buckley*, Justice Ginsburg reiterated a long-standing notion that "'core political speech' [such as that] involv[ing] 'interactive communication concerning political change'"[191] is speech for which "First Amendment protection . . . is 'at its zenith.'"[192] She thus

182. Vogel, *supra* note 48, at 831.
183. *See infra* notes 194–200 and accompanying text.
184. *Talley*, 362 U.S. at 65.
185. *Watchtower*, 536 U.S. at 164 (quoting Thomas v. Collins, 323 U.S. 516, 539 (1945)).
186. *Id.* at 167.
187. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 342 (1995).
188. Lidsky, *supra* note 18, at 888; *see also infra* note 294 (discussing the legitimate deterrent effect of libel law).
189. *McIntyre*, 514 U.S. at 350–51 n.13.
190. *Id.*; *see also* Buckley v. Valeo, 424 U.S. 1, 64–65 (1976) (per curiam) (applying some form of heightened scrutiny to a campaign finance disclosure law); Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 214 (1998) (Thomas, J., concurring) (recognizing that although *Buckley v. Valeo* purportedly applied a strict scrutiny test, "its formulation . . . was more forgiving than the traditional understanding of that exacting standard").
191. Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. at 186 (majority opinion) (quoting Meyer v. Grant, 486 U.S. 414, 422 (1988)).
192. *Id.* at 187 (quoting Meyer v. Grant, 486 U.S. 414, 425 (1988)); *see also* Eu v. S.F. County Democratic Cent. Comm., 489 U.S. 214, 223 (1989) ("[T]he First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971))).

required "vigilan[ce] in . . . guard[ing] against undue hindrances to political conversations and the exchange of ideas."[193] She suggested that such vigilance takes the form of strict scrutiny.[194]

As it turns out, strict scrutiny is too vigilant. In *Doe v. Reed*, the Court clarified that while heightened scrutiny is appropriate when core political speech is at issue, when it comes to disclosure requirements, the level of review is exacting scrutiny, not strict.[195] The Court pointed out that Washington's Public Records Act and similar disclosure requirements are not prohibitions on speech.[196] Thus, strict scrutiny is too strict.[197] Rather, when these disclosure mandates implicate a fundamental right such as the right to speak freely on political issues, exacting scrutiny is the appropriate level of review.[198]

This is consistent with the Court's decision in *McIntyre*. There, the Court applied "exacting scrutiny"[199] in part because the law at issue, limiting anonymous campaign literature, burdened political expression but did not prohibit it.[200] Commentators after *McIntyre* questioned whether such exacting scrutiny would protect nonpolitical anonymous speech.[201] *Watchtower*[202] may have answered that question.[203] In *Watchtower*, the Court invalidated a prior restraint on speech that was not political.[204] However, it did so without determining a level of scrutiny and suggested that another

193. *Buckley*, 525 U.S. at 192 (citing *Meyer*, 486 U.S. at 421).
194. *Id.* at 192 n.12 (1998) (quoting *Buckley*, 525 U.S. at 208–09 (Thomas, J., concurring)).
195. Doe v. Reed, 130 S. Ct. 2811, 2820 n.2 (2010); *see also infra* Part II.B.
196. *Reed*, 130 S. Ct. at 2818.
197. *Id.*
198. *See id.*
199. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 346 (1995) (quoting Meyer v. Grant, 486 U.S. 414, 420 (1988)).
200. *See id.* at 346.
201. Ekstrand, *supra* note 126, at 413 (citing George H. Carr, Note, *Application of U.S. Supreme Court Doctrine to Anonymity in the Networld*, 44 CLEV. ST. L. REV. 521, 535 (1996)); Donald J. Karl, Comment, *State Regulation of Anonymous Internet Use After* ACLU of Georgia v. Miller, 30 ARIZ. ST. L.J. 513, 529 (1998); Michael H. Spencer, *Anonymous Internet Communication and the First Amendment: A Crack in the Dam of National Sovereignty*, 3 VA. J.L. & TECH. 1, ¶ 3 (1998)).
202. Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton, 536 U.S. 150 (2002).
203. *Watchtower* is considered the "first time [the Court considered] the extent to which prior disclosure requirements are permissible in a context not involving election regulation." Vogel, *supra* note 48, at 829.
204. *Watchtower*, 536 U.S. at 167–68.

fundamental right might be at stake—the right to freely express one's religious beliefs.[205]

c. Protecting the Right to Freely Associate

Generally, the government may not inquire into one's private associations without a compelling justification.[206] This was one of the Court's major concerns in *Talley*.[207] The broad prohibition on anonymous speech could potentially scare off individuals fearing the ramifications of associating with a particular cause.[208] *Talley* relied on *Bates v. City of Little Rock*[209] and *NAACP v. Alabama ex rel. Patterson*[210] for the proposition that "there are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified."[211]

In both *Bates* and *Patterson*, the Supreme Court found that a compelled disclosure law, as applied to the NAACP, violated its members' constitutional right to freely associate. In *Patterson*, the Court held that this freedom "is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment."[212] The Court called for "the closest scrutiny" when the government infringes upon one's freedom to associate, regardless of whether the association "pertain[s] to political, economic, religious or cultural matters."[213] It acknowledged that past identity revelations had "exposed . . . members to economic reprisal, loss of employment,

205. *Id.* at 167. Petitioners in *Watchtower* argued that strict scrutiny should apply because "the ordinance potentially infringes upon two constitutionally protected rights—freedom of speech and freedom of religion—thereby making their claim one of 'hybrid rights.'" Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton, 240 F.3d 553, 560 (6th Cir. 2001) *rev'd*, *Watchtower*, 536 U.S. 150 (2002). The Supreme Court did not address this argument, but its emphasis on the "objective burden on some speech of citizens holding religious or patriotic views" suggests it gave the argument some credibility. *Watchtower*, 536 U.S. at 167.

206. Bates v. City of Little Rock, 361 U.S. 516, 524–25 (1960); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 466 (1958); Karl, *supra* note 211, at 530 (citing Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 544 (1963)).

207. Talley v. California, 362 U.S. 60 (1960).

208. *Id.* at 65.

209. *Bates*, 361 U.S. 516.

210. *Patterson*, 357 U.S. 449.

211. *Talley*, 362 U.S. at 65.

212. *Patterson*, 357 U.S. at 460 (citation omitted).

213. *Id.* at 460–61.

threat of physical coercion, and other manifestations of public hostility."[214] The Court's concern, that the law may "induce members to withdraw from the Association and dissuade others from joining it," warranted strict scrutiny.[215] Failing that standard, the law as applied to the NAACP was unconstitutional.[216]

Cases such as *Bates* and *Patterson* have led to the possibility of as-applied challenges based on this freedom to associate. *Doe v. Reed* makes this proposition clear. In *Doe v. Reed*, the Court applied exacting scrutiny to disclosures implicating political speech but suggested that a showing of likely harassment would warrant even higher scrutiny.[217]

d. Other Interests in Anonymity

The Supreme Court has articulated other concerns when the state burdens speech by disallowing anonymity. In *Watchtower*, for example, the Court was not only dissatisfied with the ordinance's pre-speech disclosure requirement,[218] but it also found that this requirement "imposes an objective burden on some speech of citizens holding religious or patriotic views."[219] However, contrary to Justice Scalia's concerns,[220] the Supreme Court has not articulated a generally applicable right to anonymity. In *McIntyre*, for example, the Court only considered a broad, pre-speech disclosure requirement and framed the "case [as] 'involv[ing] a limitation on political

214. *Id.* at 462.

215. *Id.* at 462–63; *accord* Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 101–02 (1982); Bates v. City of Little Rock, 361 U.S. 516, 527 (1960) (finding city tax ordinance requiring the disclosure of membership lists violated the members constitutional right to freely associate).

216. *Patterson*, 357 U.S. at 466.

217. Doe v. Reed, 130 S. Ct. 2811, 2821 (2009); *see also id.* at 2822–27 (Alito, J., concurring) (arguing that plaintiffs will likely prevail because of a reasonable probability of harassment if their names are disclosed); Buckley v. Valeo, 424 U.S. 1, 71 (1976) (per curiam) (applying something less than strict scrutiny to a campaign finance disclosure law but leaving open the possibility of "a case, similar to those before the Court in *NAACP v. Alabama [ex rel. Patterson]* and *Bates*, where the threat to exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that the Act's requirements cannot be constitutionally applied" (citations omitted)).

218. Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton, 536 U.S. 150, 166 (2002).

219. *Id.* at 167.

220. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 380 (1995) (Scalia, J., dissenting) (arguing that the majority's "unprecedented protection for anonymous speech" was so broad that it "seemingly invalidated" a variety of laws that infringed upon anonymity generally).

expression subject to exacting scrutiny.'"[221] Therefore, it seems that the First Amendment's rigorous protection of anonymous speech, just as its protection of speech in general,[222] is dependent upon the class of speech at issue.[223]

B. Doe v. Reed*: No Blanket Right to Anonymity in the State Political Process*

In the four cases discussed above, the Supreme Court seemed to treat certain concerns as if they implicated fundamental rights and thus applied heightened, or even strict, scrutiny to laws stripping speakers of their anonymity.[224] *Doe v. Reed*, the Court's most recent anonymous speech decision, however, expressly rejects strict scrutiny of disclosure laws involving political speech.[225] The implication is

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221. *Id.* at 346 (majority opinion) (quoting Meyer v. Grant, 486 U.S. 414, 420 (1988)); *see also Reed*, 130 S. Ct. at 2831 n.4 (Sotomayor, J., concurring) ("Justice Scalia conceives of the issue as a right to anonymous speech. But our decision in *McIntyre* posited no such freewheeling right." (citation omitted)).

222. The Supreme Court makes distinctions among classes of speech when analyzing the level of First Amendment scrutiny to apply. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562–63 (1980) (recognizing that the "Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression"); *see also* Collins *supra* 190, at 14–15 ("[C]lassification of the kinds of expression involved informs the test to be employed."); Carr, *supra* note 211, at 536 ("American free-speech jurisprudence has long recognized that speech is protected according to the valuation of its content by the government.") (citation omitted)).

223. *See* In re Anonymous Online Speakers, No. 09-71265, 2011 WL 61635 at *4 (9th Cir. Jan. 7, 2011) ("[W]e suggest that the nature of the speech should be a driving force in choosing a standard by which to balance the rights of anonymous speakers in discovery disputes." (citing Perry v. Schwarzenegger, 591 F.3d 1147, 1160-61 (9th Cir. 2010); Doe v. Reed, 130 S.Ct. 2811, 2817-18 (2010))).

224. Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 192 n.12 (1998) (describing its decision as "in keeping with the 'now settled approach' that state regulations 'impos[ing] "severe burdens" on speech . . . [must] be narrowly tailored to serve a compelling state interest'" (alterations in original) (quoting *Buckley*, 525 U.S. at 206 (Thomas, J., concurring)); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 336, 346 (1995) (finding the right of assembly is a fundamental right, and that "limitation[s] on political expression [are] subject to exacting scrutiny" (quoting Meyer v. Grant, 486 U.S. 414, 420 (1988)); Talley v. California 362 U.S. 60, 66 (1960) (Harlan, J., concurring) (reasoning that "state action impinging on free speech and association will not be sustained unless the governmental interest asserted to support such impingement is compelling" and failing to find the government action limited to a compelling interest). *But see* Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton, 536 U.S. 150, 164 (2002) (declining to determine the standard of review to apply to a content neutral law with the effect of stripping individuals of their right to speak anonymously because "the breadth of the speech affected . . . and the nature of the regulation make it clear that the Court of Appeals erred in upholding it").

225. Doe v. Reed, 130 S. Ct. 2811, 2818, 2820 n.2 (2010).

that the lesser standard of exacting scrutiny is appropriate when disclosure laws burden a fundamental right.[226]

Doe v. Reed addressed a facial challenge to Washington State's Public Records Act (PRA).[227] The case arose out of Washington Governor Christine Gregoire's decision to sign Senate Bill (SB) 5688 into law, granting same-sex partners rights equal to that of any other state-registered domestic partner.[228] In response, an organization, known as Protect Marriage Washington, gathered more than the requisite 120,000 signatures it needed to put SB 5688 to a popular vote in the form of a referendum.[229] The efforts of Protect Marriage Washington ultimately failed when 53% of Washington voters approved of SB 5688.[230]

Before the SB 5688 vote, a group of concerned citizens made a formal request under the PRA for the names of the signatories of the Protect Marriage Washington petition.[231] The PRA entitles individual citizens access to public records upon request.[232] Washington asserted that referendum petitions are public records within the meaning of the PRA.[233] The requesters intended to post online the names of people who signed the petition, prompting Protect Marriage Washington and some of its petition signers to seek an injunction.[234]

The Supreme Court was not asked whether disclosure of the particular names on the Protect Marriage Washington petition violates the First Amendment.[235] Rather, the only question to make its way to the Supreme Court was whether the PRA is unconstitutional as applied to referendum petitions generally.[236] The

226. *Id.* at 2820 n.2 (2010) ("Justice Thomas's contrary assessment of the relationship between the disclosure of referendum petitions generally and the State's interest in this case is based on his determination that strict scrutiny applies rather than the [exacting scrutiny] standard of review we have concluded is appropriate." (citations omitted)).
227. *Id.* at 2811.
228. *Id.* at 2816.
229. *Id.*
230. *Id.*
231. *Reed*, 130 S. Ct. at 2816.
232. WASH. REV. CODE § 42.56.070(1) (2008).
233. *Reed*, 130 S. Ct. at 2816.
234. *Id.*
235. *Id.* at 2817.
236. *Id.*

Court reasoned that signing a political petition constitutes "the expression of a political view [and thus] implicates a First Amendment right."[237] Next, it addressed how closely courts should scrutinize disclosure requirements implicating this First Amendment right.[238]

The Court explained that when political speech is at issue, "exacting scrutiny" is appropriate.[239] This heightened level of review "requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest."[240] Under exacting scrutiny, the Court found that Washington's governmental interests were sufficiently important.[241] Washington sought to "preserv[e] the integrity of the electoral process by combating fraud, detecting invalid signatures, and fostering government transparency and accountability."[242] The Court held that public disclosure substantially furthers this interest.[243]

Finally, the Court left open the possibility of an as-applied challenge to the PRA. The Court explained that "disclosure 'would be unconstitutional as applied to an organization if there were a reasonable probability that the group's members would face threats, harassment or reprisals if their names were disclosed.'"[244]

Doe v. Reed clarified that when mandated disclosure burdens the right to speak on political issues, exacting scrutiny is appropriate.[245] The four anonymous speech cases discussed in Part II.A suggest that there may also be other fundamental rights that, when burdened by disclosure laws, warrant this level of scrutiny.[246] Thus, Supreme

237. *Id.*
238. *Id.* at 2818 (citations omitted).
239. *Reed*, 130 S. Ct. at 2818 (citations omitted).
240. *Id.* (internal quotation marks omitted) (quoting Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 914 (2010)). Justice Thomas criticized this decision to apply exacting scrutiny rather than strict scrutiny. *Id*. at 2839 (Thomas, J. dissenting). This position is consistent with his concurrence in *Buckley v. American Constitutional Law Foundation, Inc*., 525 U.S. 182, 206 (1998) (Thomas, J., concurring); *see also supra* notes 169–76 and accompanying text.
241. *Reed*, 130 S. Ct. at 2819–20.
242. *Id*. at 2819.
243. *Id*. at 2820.
244. *Id*. at 2821 (quoting Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 915 (2010)).
245. *Infra* notes 235–53 and accompanying text.
246. *Infra* Part II.A.2.

Court precedent provides the basis for a due process approach to deciding whether to compel disclosure in anonymous defamation cases.[247]

III. DUE PROCESS PROTECTS ONLINE ANONYMITY AND PRESERVES REPUTATION

New technology invites new legal standards.[248] Many courts have accepted this invitation when considering whether to compel the disclosure of identity of an anonymous blogger in a defamation suit.[249] These courts have developed varying approaches in efforts to balance the interests of the potentially defamed against the purported First Amendment right of anonymity.[250] However, others like the New York court in *Cohen* argue against new rules, asserting that existing procedural safeguards combined with libel law provide adequate First Amendment protection.[251] Courts need not develop new standards but, rather, should apply due process jurisprudence to this new issue to ensure an adequate balance of interests.

A. What is Due Process?

The Fourteenth Amendment states that no "State [shall] deprive any person of life, liberty, or property, without due process of law,"[252] and the First Amendment protection of speech is incorporated as a protected liberty.[253] Further, as explained in Part II, prohibiting anonymity may significantly infringe upon one's

247. *Supra* Part III.
248. *See, e.g.*, Hahnemann Univ. Hosp. v. Dudnick, 678 A.2d 266, 268–70 (N.J. Super. Ct. App. Div. 1996) (acknowledging that the advent of computers invited a new test to determine whether computerized records satisfy the business records hearsay exception but rejecting this idea, finding generally applicable business records exception satisfactorily considers necessary hearsay concerns).
249. *See, e.g.*, Doe v. Cahill, 884 A.2d 451, 455–56 (Del. 2005); Dendrite Int'l, Inc. v. Doe, 775 A.2d 756, 759 (N.J. Super. Ct. App. Div. 2001).
250. *Supra* Part I.
251. *See* Cohen v. Google, Inc., 887 N.Y.S.2d 424 (N.Y. Sup. Ct. 2009); *see also* Vogel, *supra* note 48, at 855–56.
252. U.S. CONST. amend. XIV, § 1.
253. Gitlow v. New York, 268 U.S. 652, 666 (1925).

constitutional right to speak.[254] Before the State can do so, it must provide due process of law.[255] Due process has two components: procedural due process and substantive due process.[256]

1. Procedural Due Process

At a minimum, procedural due process requires that before there is a deprivation of liberty, one deserves notice and an opportunity to be heard. [257] "[T]he two central concerns of procedural due process [are] the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision-making process."[258] In the context of post-speech compelled identity disclosure, this means the anonymous speaker must receive notice of the motion seeking her identity and the chance to argue against it.[259]

As discussed in Part I.A, courts already require such procedural due process. Most courts mandate that the defamation plaintiff take reasonable steps towards notifying the anonymous blogger of the pending disclosure request.[260] The debate over pre-action identity disclosure in potential online defamation suits is therefore not concerned with whether speakers are granted procedural due process. Instead, the debate is whether the Constitution requires something more.

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254. *See supra* Part II and notes 126–86 and accompanying text.

255. U.S. CONST. amend. XIV, § 1.

256. 16B AM. JUR. 2d *Constitutional Law* § 901 (1998) ("[T]he concept of due process of law has a dual aspect, substantive and procedural." (citations omitted)).

257. *See* LaChance v. Erickson, 522 U.S. 262, 266 (1998) ("The core of due process is the right to notice and a meaningful opportunity to be heard." (citation omitted)); Goss v. Lopez, 419 U.S. 565, 579 (1975) ("At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given *some* kind of notice and afforded *some* kind of hearing."); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) (holding that due process requires any deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case").

258. Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980).

259. *See, e.g.*, Doe v. Cahill, 884 A.2d 451, 460 (Del. 2005) (requiring plaintiff to "undertake efforts to notify the anonymous poster that he is subject of a subpoena or application for order of disclosure").

260. *Supra* notes 53–63 and accompanying text.

2. Something More: Substantive Due Process and Exacting Scrutiny

In *Washington v. Glucksberg*, the Supreme Court provided a sound framework for determining whether in light of a liberty deprivation, the Constitution requires something more than notice and a hearing.[261] The Court explained two levels of review: strict scrutiny and rational basis. A State cannot establish a law that directly infringes on a fundamental right unless the State can satisfy strict scrutiny by showing that the law is narrowly tailored to achieving a compelling state interest.[262] Non-fundamental rights, however, can be burdened so long as the infringement satisfies traditional rational review, that is, it is rationally related to a legitimate state purpose.[263] To determine if the right is fundamental, a court carefully describes the asserted right and then determines whether that right is "objectively, deeply rooted in this Nation's history and tradition . . . and implicit in the concept of ordered liberties."[264]

Recent Supreme Court precedent, however, provides for an additional level of review in cases where state action affects but does not directly attack a fundamental right. For example, the Supreme Court recognizes a fundamental right to privacy and autonomy when making choices about reproduction.[265] State anti-abortion laws burdening these rights may nonetheless be valid under a level of review less than strict scrutiny.[266] Most recently, the Court has applied a similar approach to disclosure laws burdening fundamental free speech rights.[267]

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261. Washington v. Glucksberg, 521 U.S. 702 (1997).
262. *See id.* at 720–22.
263. *See id.* at 722.
264. *Id.* at 720–21 (internal quotation marks and citations omitted).
265. Carey v. Population Servs. Int'l, 431 U.S. 678, 685–86 (1977) (invalidating a law requiring licensed pharmacists to distribute contraceptives because it infringed on the fundamental right to make decisions regarding child-rearing); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (invalidating a forced sterilization law for habitual criminals in part because of the fundamental nature of personal procreation choices).
266. Planned Parenthood v. Casey, 505 U.S. 833, 874 (1992) (rejecting strict scrutiny and applying an "undue burden" test to certain abortion regulations that do not strike directly at the right to privacy in childbearing decisions).
267. Doe v. Reed, 130 S. Ct. 2811, 2818 (2010).

Laws requiring disclosure may affect, but not directly attack, certain fundamental free speech rights.[268] Such disclosure laws "may burden the ability to speak, but . . . do not prevent anyone from speaking."[269] As *Doe v. Reed* explains, in such cases the proper level of review is exacting scrutiny.[270] Importantly, however, *Doe v. Reed* follows a line of cases suggesting that exacting scrutiny is appropriate "in the electoral context."[271] This is because free speech on political topics is fundamental.[272] Presumably, when disclosure laws burden speech not deemed fundamental, courts should apply rational basis review.[273] This substantive due process analysis is applicable to cases of pre-action identity disclosure in potential defamation suits.[274]

B. Due Process in Action: Disclosure in Potential Defamation Suits

Courts invariably apply procedural due process in the anonymous defamation context.[275] However, courts should also rely on substantive due process: first deciding whether a heightened standard—in this case, exacting scrutiny—is appropriate, and if so, applying it.

1. Whether to Apply Heightened Scrutiny

The two-pronged exacting scrutiny standard described above[276] is only necessary if a fundamental right is at stake.[277] Courts determine whether a right is fundamental in light of history, tradition, and the right's role in the concept of ordered liberty.[278] As explained above in

268. *Id.*
269. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 914 (2010), *quoted in Reed*, 130 S. Ct. at 2818.
270. *Id.*; *supra* Part II.B, notes 249–253 and accompanying text.
271. *Reed*, 130 S. Ct. at 2818.
272. *See supra* Part II.A.2.b (discussing the fundamental right to free speech on political issues).
273. *See infra* Part III.B.1.d.
274. *Infra* Part III.B.
275. *See supra* notes 53–63 and accompanying text.
276. *See supra* notes 249–53 and accompanying text.
277. Washington v. Glucksberg, 521 U.S. 702, 720–22 (1997) (requiring heightened scrutiny only when a fundamental right is at stake); Doe v. Reed, 130 S. Ct. 2811, 2818 (2010) (applying exacting scrutiny because the disclosure laws burdened political speech rights).
278. Washington v. Glucksberg, 521 U.S. at 720–21.

Part II.A, the Supreme Court has weighed these considerations and articulated certain speech rights deserving of this heightened level of review: the right to enter into the marketplace of ideas anonymously and free of conditions,[279] the right to express political views anonymously,[280] and the right to associate anonymously.[281] If a defamation suit does not implicate a fundamental right, then disclosure must merely pass the rational basis test.

a. Condition-Free Entry into the Marketplace of Ideas

Pre-action disclosure in anonymous defamation suits does not implicate the First Amendment concern with placing conditions upon the entry into the marketplace of ideas. Cases that consider whether to compel the identity of an anonymous blogger *after* the posting of the blog are not evaluating broad laws requiring disclosure as a "*condition of entry*."[282] Indeed, in such cases, the individual freely and anonymously enters into the marketplace with no explicit conditions.[283]

Further, to the extent that the threat of a future defamation lawsuit deters an anonymous blogger from entering the marketplace of ideas, this is no different than how the law of defamation operates in non-anonymous situations.[284] Defamation jurisprudence naturally limits

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279. *Supra* notes 191–200 and accompanying text.

280. *Supra* notes 201–15 and accompanying text.

281. *Supra* notes 216–27 and accompanying text.

282. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 342 (1995) (emphasis added); *see also* Vogel, *supra* note 48, at 837.

283. *See* Vogel, *supra* note 48, at 837–38.

284. Lidsky, *supra* note 18, at 888 ("Defamation law legitimately seeks to deter individuals from communicating defamatory falsehoods; the problem arises, for First Amendment purposes when defamation law 'overdeters'—that is, when it deters speech that is truthful or nondefamatory—for such speech occupies a 'preferred position' in the constitutional hierarchy of values." (citation omitted)); Vogel, *supra* note 48, at 837–38 ("[T]he Supreme Court has made clear that some risk of deterrence is acceptable if closely tied to a legitimate governmental interest."). Concededly, the law of defamation itself may not provide adequate protections in non-anonymous situations. *See generally* Susan M. Gilles, *Taking First Amendment Procedure Seriously: An Analysis of Process in Libel Litigation*, 58 OHIO ST. L.J. 1753 (1998). Gilles explains that in a typical libel case, the First Amendment provides "no protection[] at the initial pleading and discovery stages." *Id.* at 1774. However, the issue of whether it is too easy to bring a defamation suit generally, thus constraining free speech unconstitutionally, is beyond the scope of this Note.

one's constitutional right to speak freely.[285] As *Doe v. Cahill* acknowledges, "[c]ertain classes of speech, including defamatory and libelous speech, are entitled to no Constitutional protection."[286] The Supreme Court has developed extensive law that cabins these limits so as not to unnecessarily chill speech.[287] In doing so, the Court has implicitly found that what is left of state defamation law does not on its face violate the First Amendment's protection of free speech merely by putting speakers on notice that they may be subject to a lawsuit if their speech is defamatory.[288] Fear of a future defamation suit is meant to limit speech in order to protect citizens from damage to their reputation.[289] Therefore, when deciding whether to compel the disclosure of an anonymous blogger in a potential defamation suit, the fundamental right to enter into the marketplace of ideas, free from conditions, is not implicated.

b. Freedom to Anonymously Speak on Political Issues

In some potential online defamation suits, however, a fundamental speech right is implicated, and disclosure may warrant exacting scrutiny. For example, when the speech at issue is political, compelling identity disclosure warrants the heightened standard.[290] In *Doe v. Cahill*, the court applied a heightened standard when addressing potential defamation in political speech.[291] The court refused to force the disclosure of anonymous speakers' identities

285. Lidsky, *supra* note 18, at 888–89.

286. Doe v. Cahill, 884 A.2d 451, 456 (Del. 2005).

287. *See, e.g.*, Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 666–67 (1989) (holding that a public figure plaintiff must show *actual malice* to sustain a claim of defamation against a media defendant, and the showing of a profit motive is insufficient to satisfy this element); Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986) (holding private party plaintiff has the burden of proving falsity in a defamation suit against a media defendant when the alleged defamation is a matter of public concern); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (requiring a showing of actual malice when a public figure plaintiff sues in defamation).

288. *See supra* note 297 and *infra* note 299.

289. Vogel, *supra* note 48, at 831 ("Common-law claims against those whose speech constitutes fraud, defamation or another wrong are an important part of the governmental mechanism for deterring such wrongdoing. Indeed, the Court has recognized that common-law defamation claims provide an essential safeguard protecting the public against the risk of abuse inherent in the right to speak anonymously.").

290. *See supra* Part II.A.2.b

291. *Cahill*, 884 A.2d at 460.

because the plaintiffs were unable to support their "defamation claim with facts sufficient to defeat a summary judgment motion."[292] The court was also quick to point out that it was "the first State Supreme Court to address this issue, particularly in the context of a case involving *political* criticism of a public figure."[293] Similarly, the Wisconsin Supreme Court reasoned that "a defamation plaintiff should not be able to employ the rules of discovery to obtain the identity of an anonymous *political* speaker simply by filing a complaint that is facially unsustainable."[294]

In *Greenbaum v. Google*, an anonymous blogger criticized Greenbaum, an elected school board member, for her opposition to using public school money to support private school interests.[295] The court did not require the production of evidence to support the merit of the plaintiff's defamation claim because it did not need to.[296] It held that "the statements on which petitioner seeks to base her defamation claim are plainly inactionable as a matter of law."[297] However, the court implied that some heightened scrutiny would be appropriate considering Greenbaum sought relief "on the eve of a

292. *Id.* at 460. However, *Cahill* further held that "a public figure defamation plaintiff must only plead and prove facts with regard to elements of the claim that are within his control." *Id.* at 464. The court reasoned that it is "difficult, if not impossible" for a public figure "[w]ithout discovery of the defendant's identity, [to] satisfy[] [the] element" of actual malice, as required by the law of defamation. *Id.*

293. *Id.* at 457 (emphasis added). Commentator Jason Miller acknowledges that heightened standards are necessary in some but not all circumstances, but bases the distinction on the nature of the plaintiff rather than the nature of the speech. Jason C. Miller, *Who's Exposing John Doe? Distinguishing Between Public and Private Figure Plaintiffs in Subpoenas to ISPs in Anonymous Online Defamation Suits*, 12 J. TECH. L. & POL'Y 229 (2008). Miller's approach utilizes the private/public figure distinction of traditional defamation jurisprudence to "advocate[] [for] the adoption of a standard that makes it easier to issue subpoenas against Internet Service Providers (ISPs) to reveal the identity of anonymous posters when the plaintiff is a private figure while retaining and developing more difficult standards when the plaintiff is a public figure." *Id.* at 230. This approach would make it more difficult for Liksula Cohen, arguably a public figure, to obtain the identity of the anonymous blogger who allegedly defamed her. *See* Dowd, *supra* note 2 (stating that Cohen was a Vogue cover model). As discussed *supra* in Part II, the Supreme Court has never evinced great concern over the type of anonymous speech at issue in *Cohen*.

294. Lassa v. Rongstad, 718 N.W.2d 673, 685 (Wis. 2006) (emphasis added).

295. Greenbaum v. Google, Inc., 845 N.Y.S. 2d 695, 699–700 (N.Y. Sup. Ct. 2007).

296. *Id.* at 698–99 (citing Dendrite Int'l, Inc. v. Doe, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001)).

297. *Greenbaum*, 845 N.Y.S. at 699.

school board election,"[298] and thus compelling disclosure "would have a chilling effect on *protected political* speech."[299]

c. Freedom to Anonymously Associate

Finally, the Supreme Court has recognized a fundamental right to freely and anonymously associate.[300] If this right is implicated, courts should apply heightened scrutiny to pre-action disclosure motions.[301] The right of association has rarely been implicated when a defamation plaintiff seeks the identity of a John Doe defendant.[302] One case in which this right was loosely at issue was *Lassa v. Rongstad*.[303] In *Lassa*, a nonprofit organization educating the public on policy issues refused to release the names of five of its members who anonymously made statements about a local political candidate.[304] In adopting a heightened standard to its review of decisions to compel disclosure,[305] the Wisconsin Supreme Court was moved in part by concerns that divulging the group members' identities impedes their freedom to associate.[306] As more cases come to court, it is possible the First Amendment's right to freely and

298. *Id.* at 701.
299. *Id.* (emphasis added).
300. *See supra* notes 216–20 and accompanying text.
301. *See* Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 212 (1998) (Thomas, J., concurring) (arguing for strict scrutiny when associational rights are burdened).
302. Research for this Note revealed only one relevant case in which an associational right was implicated. Lassa v. Rongstad, 718 N.W.2d 673 (Wis. 2006). *But see* Perry v. Schwarzenegger, 591 F.3d 1147, 1164–65 (9th Cir. 2010) (holding that the First Amendment right to free association protects against the disclosure of political membership lists). *Perry* did not involve anonymous speakers. *Id.*; *see* In re Anonymous Online Speakers, No. 09-71265, 2011 WL 61635 at *4 (9th Cir. Jan. 7, 2011) ("The Perry decision rested on the importance of political association and political expression, and it did *not* involve anonymous speakers." (emphasis added)).
303. *Id.*
304. *Id.* at 677–79.
305. Wisconsin essentially applied the same heightened standard of *Doe v. Cahill*, 884 A.2d 451 (Del. 2005). In *Lassa*, Wisconsin required the defamation plaintiff allege specific facts sufficient to survive a motion to dismiss, but because Wisconsin requires pleading defamation with particularity, it essentially is the same standard as Delaware's summary judgment motion. *Lassa*, 718 N.W.2d at 687.
306. Wisconsin ultimately decided that even under the heightened standard, the lower court did not err by compelling disclosure. *Lassa*, 718 N.W.2d 686–88.

anonymously associate will protect an anonymous blogger's identity with the judicial power of heightened scrutiny.[307]

d. Non-fundamental Rights: Rational Review, State Law, and the Safety Valve

When anonymous speech does not implicate one of the fundamental rights articulated by the Supreme Court, the constitutionally required balance of interests is satisfied by procedural due process and rational basis review. So long as the anonymous speaker has notice and an opportunity to argue against disclosure,[308] a court need only ask whether it has a reasonable basis to believe that compelled disclosure will further a legitimate claim of defamation.[309] As commentator Michael Vogel points out, "relatively mundane rules of civil procedure"[310] provide multiple opportunities to adequately balance interests.[311] In essence, the First Amendment leaves it up to the states to decide how to approach pre-action discovery requests when a fundamental anonymity right is not at stake.

This outcome may seem unsatisfying. Often when plaintiffs seek the identity of online complainants, the speech at issue does not implicate a fundamental right.[312] Existing procedural safeguards may not prevent a corporate plaintiff from obtaining one's identity, even in cases where it seems likely the goal of the subpoena is merely to

307. *See* Doe v. Reed, 130 S. Ct. 2811, 2822–27 (2010) (Alito, J., concurring) (suggesting that an as-applied challenge to Washington's disclosure law would be sustained in part because of its serious infringement on the right to freely and privately associate).

308. *See supra* notes 267–70 and accompanying text.

309. *See* Washington v. Glucksberg, 521 U.S. 702, 722 (1997) (implying that government action burdening non-fundamental rights need only meet a lesser standard of being reasonably related to a legitimate government purpose).

310. Vogel, *supra* note 48, at 841.

311. *Id.* Vogel suggests several procedural and technical requirements of civil procedure that adequately balance interests including: complaint drafting, submitting an order to show cause, arguing at a hearing for such an order, serving the subpoena to an entity that has the capability of revealing the identity, and post-discovery remedies such as Rule 11 motions for sanctions based on false claims. *Id.*

312. Many cases reviewed for this Note do not implicate the fundamental right to anonymous political speech or anonymous association. *See, e.g.*, Dendrite Int'l, Inc. v. Doe, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001); Cohen v. Google, Inc., 887 N.Y.S.2d 424 (N.Y. Sup. Ct. 2009); *In re* Subpoena Duces Tecum to America Online, Inc., 52 Va. Cir. 26 (Va. Cir. Ct. 2000), *rev'd on other grounds sub nom.* America Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377 (Va. 2001).

reveal the speaker and subject her to some sort of corporate backlash.[313] However, though the First Amendment might not provide protection, states can and do broaden the right of anonymous speech. Consider *Dendrite*, where arguably no fundamental anonymous speech right was at stake.[314] There, an anonymous Internet poster spoke critically about the inner-workings of a corporation, not about politics.[315] There were no concerns regarding the speakers' right to freely associate.[316] The court nonetheless applied heightened scrutiny. However, in doing so, it acknowledged that "[p]recedent, text, structure, and history all compel the conclusion that the New Jersey Constitution's right of free speech is broader than the right against governmental abridgement of speech found in the First Amendment."[317]

Finally, "in peculiar circumstances" the First Amendment should recognize an exception in much the same way that the Supreme Court did in *NAACP v. Alabama ex rel. Patterson*[318]—what Justice Scalia refers to as the "safety valve."[319] The Supreme Court has recognized that, regardless of the speech at stake, when compelling disclosure would likely result in actual threats of harm, strict scrutiny is warranted.[320] Even otherwise legitimate disclosure requirements, such as the campaign contribution limits of *Buckley v. Valeo*, require this safety valve. A showing of a "reasonable probability that the compelled disclosure would result in threats, harassment or reprisals from either Government officials or private parties" would prevent disclosure.[321]

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313. *See supra* note 140.
314. *Dendrite*, 775 A.2d 756.
315. *Id.* at 762–63.
316. *See id.*
317. *Id.* at 766 (quoting N.J. Coal. Against War in the Middle East v. J.M.B. Realty, Corp., 650 A.2d 757, 770 (N.J. 1994)).
318. NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958).
319. McIntyre v. Ohio Elections Comm., 514 U.S. 334, 379 (1995) (Scalia, J., dissenting).
320. Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 101 (1982); Buckley v. Valeo, 424 U.S. 1, 25 (1976) (per curiam); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960); *Patterson*, 357 U.S. at 462–63.
321. *Buckley*, 424 U.S. at 72.

Though historically limited to implications of associational rights, this safety valve concept could provide the needed ad hoc challenge to any disclosures that would likely result in "threats, harassment, or reprisals."[322] The safety valve approach could be similar to the balancing test applied in *Dendrite International, Inc. v. Doe*.[323] Whatever standards a court applies, there should also be such a safety valve.

2. Applying Exacting Scrutiny: Is the Libel Case Sufficiently Strong Enough?

Applying exacting scrutiny has two steps: determining whether the government has a sufficiently important interest and analyzing whether its actions are substantially related to such interest.[324]

a. A Strong Libel Case Provides a Sufficiently Important Government Interest

To overcome exacting scrutiny, a law must further a sufficiently important government interest.[325] A strong libel case provides at least such a governmental interest. Using a syllogism, commentator Elad

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322. *Id.* (quoting Buckley v. Valeo, 424 U.S. at 74). It would seem that legitimate defamation suits do not constitute reprisals as the protection from defamation is a compelling government interest. *See supra* notes 336–46 and accompanying text. Justice Alito explains how this safety valve could be applied in the context of state disclosure laws of political referenda. Doe v. Reed, 130 S. Ct. 2811, 2822–27 (2010) (Alito, J., concurring) ("[P]laintiffs have a strong case that they are entitled to as-applied relief.").
Though in a different context and under a different name, Justice Powell suggested a similar safety valve in *Branzburg v. Hayes.* 408 U.S. 665, 709–10 (1972) (Powell, J., concurring). A four-justice plurality in *Branzburg* rejected an absolute reporter's privilege as applied to the compelled testimony of a reporter at a grand jury. *Id.* at 707–08 (plurality opinion). The plurality found that the First Amendment is not violated when the government compels a reporter's testimony. *Id.* at 708–09. In Justice Powell's concurrence, he argued for a type of safety valve measure whereby a reporter who shows that the compelled testimony is meant to harass him can invoke a constitutional balancing test. *Id.* at 710 (Powell, J., concurring). The balance is "between the freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions." *Id.* at 710 (Powell, J., concurring); *see also* Vogel, *supra* note 48, at 832–36.

323. Dendrite Int'l, Inc. v. Doe, 775 A.2d 756, 760–61 (N.J. Super. Ct. App. Div. 2001); *see also supra* notes 120–123 and accompanying text.

324. *Supra* notes 249–53 and accompanying text.

325. Doe v. Reed, 130 S. Ct. 2811, 2818 (2010).

Peled persuasively shows that states have not only an important, but also a compelling interest in protecting the reputation of its citizens from defamation.[326] First, the First Amendment requires a compelling government interest before allowing a content-based restriction on speech.[327] As another commentator has stated, "Content-based restrictions . . . limit communication because of the message conveyed."[328] Thus, libel law, which by definition is a limitation on speech based on its content, is a content-based restriction.[329] Finally, because libel law is generally constitutional,[330] Peled reasons that "[t]he assumption . . . should be that the need to protect reputation is a compelling interest."[331] She further highlights the "severe individual and societal harms" resulting from defamation and argues that the State has a compelling interest in preventing it.[332]

The Court's anonymous speech cases support this reasoning. In *Talley v. California*, the Court hinted that laws compelling identity disclosure, if limited to prevent "fraud, false advertising and libel,"[333] may survive the scrutiny of the Court, suggesting that preventing fraud, false advertising, and libel is at least an important government interest.[334] In *McIntyre v. Ohio Elections Commission*, the Court suggested there was at least a strong government interest in protecting truth and reputation.[335] The Court acknowledged that the "state interest in preventing fraud and libel . . . carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large."[336]

In a defamation action seeking to disclose an anonymous speaker's identity, the sufficiently important government interest is the

326. Elad Peled, *Constitutionalizing Mandatory Retraction in Defamation Law*, 30 HASTINGS COMM. & ENT. L.J. 33, 64–64 (2007).
327. Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 106 (1991).
328. Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM & MARY L. REV. 189, 190 (1983).
329. Peled, *supra* note 336, at 64–65.
330. *Id.* at 64.
331. *Id.*
332. *Id.*
333. Talley v. California 362 U.S. 60, 64 (1960).
334. *Id.*; *see also* Vogel, *supra* note 48, at 827.
335. McIntyre v. Ohio Elections Comm., 514 U.S. 334, 349–50 (1995).
336. *Id.*

protection of reputation through a libel suit.[337] Therefore, a court should scrutinize the suit itself to determine whether the defamation plaintiff has a sufficiently strong case. The Delaware Supreme Court has already developed a standard that plaintiffs must meet to survive this level of scrutiny.[338] In *Doe v. Cahill*, the court subjected a defamation plaintiff to the heightened scrutiny of the summary judgment standard. It found that doing so "will more appropriately protect against the chilling effect on anonymous First Amendment Internet speech that can arise when plaintiffs bring trivial defamation lawsuits primarily to harass or to unmask their critics."[339] Thus, if a court finds a fundamental right at stake, it should require a potential defamation plaintiff to exhibit a strong case, that is, one in which she presents evidence sufficient to survive a summary judgment motion on all elements of her claim within her control.[340]

b. Substantially Related to the Sufficiently Important Government Interest

The second prong of the exacting scrutiny standard requires government action to be substantially related to furthering its sufficiently important interest.[341] The Supreme Court has repeatedly suggested that broad laws of prior restraint will not satisfy this standard;[342] a more narrowly tailored approach might. In its recent anonymous speech cases discussed in Part II above, the Court was uncomfortable with a laws' sweeping nature yet "recognized the propriety of limitations that are closely targeted toward wrongdoers."[343] In both *McIntyre v. Ohio Elections Commission* and *Talley v. California*, the Supreme Court "left open the question

337. *See supra* notes 335–46 and accompanying text.
338. Doe v. Cahill, 884 A.2d 451 (Del. 2005).
339. *Id.* at 459.
340. *See id.* at 464. The *Cahill* court was "mindful that . . . [w]ithout discovery of the defendant's identity, satisfying th[e] element [of actual malice] may be difficult if not impossible." *Id.* It thus held that "a public figure defamation plaintiff must only plead and prove facts with regard to elements of the claim that are within his control." *Id*.
341. Doe v. Reed, 130 S. Ct. 2811, 2818 (2010).
342. *See* Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton, 536 U.S. 150, 166–67 (2002); Talley v. California, 362 U.S. 60, 65 (1960); Vogel, *supra* note 48, at 824–31.
343. Vogel, *supra* note 48, at 827.

whether a narrowly tailored law, aimed at preventing fraud and deception, might survive a First Amendment challenge."[344] In *Talley*, the Court invalidated a law purportedly geared towards preventing "fraud, false advertising, or libel"[345] but that was not so limited. The Court there explicitly did "not pass on the validity of an ordinance limited to prevent these or any other supposed evils."[346] As Commentator Michael Vogel points out, this implies "that an ordinance targeted at identifying such wrongdoers after the fact could survive First Amendment scrutiny."[347]

Similarly, the Court, in *McIntyre*, "recognize[d] that a State's enforcement interest might justify a more limited identification requirement."[348] In *Watchtower Bible and Tract Society of New York v. Village of Stratton*, the Court repeated its concern over the "breadth of speech affected"[349] by a disclosure law purportedly aimed at preventing fraud or preserving the integrity of the ballot-initiative process.[350] The Court found that the law "sweeps more broadly, covering unpopular causes unrelated to commercial transactions or to any special interest in protecting the electoral process."[351]

In contrast, a pre-action motion to compel the identity of specific individuals who have allegedly defamed someone is far narrower in scope and thus substantially related to the government's end-goal.[352] It applies to one individual or set of individuals based on a specific event.[353] Furthermore, courts often ensure its decision is as narrow as possible by requiring "that the information sought is material and *necessary* to the actionable wrong."[354] For example, in *Dendrite*

344. Karl, *supra* note 211, at 529.
345. Talley v. California, 362 U.S. 60, 64 (1960).
346. *Id.*
347. Vogel, *supra* note 48, at 827.
348. McIntyre v. Ohio Elections Comm., 514 U.S. 334, 353 (1995).
349. Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton, 536 U.S. 150, 164 (2002).
350. *Id.* at 167.
351. *Id.*
352. *See* Vogel, *supra* note 48 at 837.
353. *Id.* at 837–38.
354. Cohen v. Google, Inc., 887 N.Y.S.2d 424, 426 (N.Y. Sup. Ct. 2009) (emphasis added) (quoting Uddin v. N.Y.C. Transit Auth., 810 N.Y.S.2d 198, 199 (N.Y. App. Div. 2006)).

International, Inc. v. Doe, the New Jersey Supreme Court considered the "necessity for the disclosure of the anonymous defendant's identity"[355] as a factor in its balancing test. Similarly, in *In re Subpoena Duces Tecum to America Online, Inc.*, a Virginia court required a plaintiff to show that "the subpoenaed identity information is centrally needed to advance that claim" before it enforced the subpoena.[356] This is the type of tailoring that is required if a court is to apply exacting scrutiny in a pre-action disclosure defamation suit.

CONCLUSION

There is little consensus across jurisdictions on how to balance the interests of defamation plaintiffs with those of anonymous bloggers.[357] Courts are currently employing varying tools to ensure that the First Amendment's protection of anonymous speech is not unnecessarily trammeled, while furthering the compelling government interest of protecting citizens' reputations.[358] All courts require that the anonymous speaker be given notice of her potential loss of anonymity and an opportunity to argue against it.[359] Few courts, however, agree on how compelling a case a putative plaintiff must have before stripping a speaker of her anonymity.[360]

Some courts, like the New York court in *Cohen v. Google*, rely solely on existing state discovery laws coupled with the extensively developed defamation jurisprudence.[361] Others, such as *America Online*, leave the decision up to the discretion of the judge to determine whether the plaintiff's defamation claim is offered in good

355. Dendrite Int'l, Inc. v. Doe, 775 A.2d 756, 760–61 (N.J. Super. Ct. App. Div. 2001).
356. *In re* Subpoena Duces Tecum to America Online, Inc., 52 Va. Cir. 26, 37 (Va. Cir. Ct. 2000), *rev'd on other grounds sub nom.* America Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377 (Va. 2001).
357. *See supra* Part I.
358. *Id.*
359. *See supra* Part I.A.
360. *See supra* Parts I.B and I.C.
361. Cohen v. Google, Inc., 887 N.Y.S.2d 424 (N.Y. Sup. Ct. 2009).

faith.[362] An increasing number of courts are requiring the plaintiff to produce actual evidence on every element of her cause of action within her control.[363] There is both great uncertainty and a rush to develop new rules.[364]

As commentator Michael Vogel argues, new rules may not be necessary.[365] Old rules, however, such as the well-developed law of due process should not be ignored. Courts invariably invoke procedural due process when requiring that anonymous bloggers receive notice and an opportunity to be heard.[366] They should further rely on substantive due process when considering whether to compel disclosure in a potential defamation suit.

In four of its anonymous speech cases, the Supreme Court articulated the fundamental rights warranting heightened scrutiny including the right to anonymously speak on political issues and the right to anonymously associate.[367] In *Doe v. Reed*, the Court clarified that, as applied to a disclosure law burdening a fundamental speech right, the level of scrutiny is exacting.[368]

When fundamental rights are implicated, courts should not merely rely on generally applicable pre-action disclosure rules. Rather, courts should apply exacting scrutiny by requiring plaintiffs to lay out a sufficiently important case of defamation. Interestingly, courts are already doing this by requiring that a defamation plaintiff show enough evidence to survive a summary judgment.[369] This requirement, however, should be limited to instances when a fundamental right is at stake. In other cases, courts should rely on their generally applicable pre-action disclosure procedures. Finally, even if a fundamental speech right is not implicated, if revealing a

362. *In re* Subpoena Duces Tecum to America Online, Inc., 52 Va. Cir. 26 (Va. Cir. Ct. 2000), *rev'd on other grounds sub nom.* America Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377 (Va. 2001).

363. *See supra* Part I.B.2.

364. *See supra* Parts I.B–I.C.

365. Vogel, *supra* note 48, at 855.

366. *Supra* Part I.A.

367. *Supra* Part II.A.

368. *Supra* Part II.B.

369. *Supra* Part III.

speaker's identity is likely to result in harm, courts can invoke a safety valve and prevent disclosure.

The New York court that barely batted an eye as it compelled the disclosure of the blogger of "Skanks of NYC" had it right.[370] This blog was a far cry from the anonymous Federalist Papers, and no fundamental right was at stake.[371] The speech was clearly not political, and the blogger was not anonymously associating.[372] Liskula Cohen needed to show only a reasonable basis for the court to find she had a legitimate defamation suit.[373] Cohen thus succeeded and discovered that Rosemary Port, an acquaintance of hers from the fashion world, was the anonymous blogger. Cohen forgave Port and dropped her legal pursuit.[374] The First Amendment had better things to do.

370. Cohen v. Google, Inc., 887 N.Y.S.2d 424 (N.Y. Sup. Ct. 2009).
371. *Id.*
372. *Id.*
373. *Id.*
374. Dowd, *supra* note 2.