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Digitally Unknown: Why the Ninth Circuit Should Wish to Remain Anonymous in In re Anonymous Online Speakers

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Digitally Unknown: Why the Ninth Circuit Should Wish to Remain Anonymous in *In re Anonymous Online Speakers*

I. INTRODUCTION

Anonymous speech has a long and rich history in the United States. For example, the Federalist Papers, drafted by James Madison, John Jay, and Alexander Hamilton, were published under the pseudonym "Publius."[1] The value of the Federalist Papers to civil dialogue is undisputed, and it is likely that they would not have had the same effect had the drafters been forced to disclose their identities.[2] As the Supreme Court has stated, "It is plain that anonymity has sometimes been assumed for the most constructive purposes."[3] Some of these purposes are to avoid chilling effects on freedom of expression[4] and to allow an unpopular speaker to speak without others prejudging her message.[5] Nearly two centuries after the Federalist Papers were published, the Supreme Court embodied in the First Amendment this long-respected right to speak anonymously.[6]

The anonymous speech doctrine, as it has come to be known, has remained vibrant in the United States—protecting individuals from laws that would require them to disclose their identities on handbills[7] and campaign literature.[8] Since the advent of the Internet, the anonymous speech doctrine has taken on an increasingly prominent role in society because anyone with Internet access can

1. E. Norman Veasey, *What Would Madison Think? The Irony of the Twists and Turns of Federalism*, 34 DEL. J. CORP. L. 35, 38 (2009).

2. *See* Jay Krasovec, Comment, *Cyberspace: The Final Frontier, for Regulation?*, 31 AKRON L. REV. 101, 127 n.116 (1997) (citing the importance of anonymous speech in the formation of our country and recognizing that "the ability to speak anonymously often provides a safe haven for those who wish to express unpopular views").

3. Talley v. California, 362 U.S. 60, 65 (1960).

4. *Id*. at 64.

5. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 342 (1995).

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

7. *Id*. at 60.

8. *McIntyre*, 514 U.S. at 357 (1995).

become a town crier or a pamphleteer.[9] While this increased access to a figurative pulpit ought to be celebrated in the marketplace of ideas, anonymous online speech also brings new challenges and problems. For example, the ease of access to an audience and the general permanence of content posted online create numerous opportunities for individuals to act maliciously behind the cloak of Internet anonymity. Thus, piercing the cloak of anonymity to identify anonymous speakers has been litigated with increasing frequency since the advent of the Internet.[10]

In early 2011, the Ninth Circuit addressed the conflict of anonymous speech in the Internet context in *In re Anonymous Online Speakers*.[11] This case presented the issue whether the veil of anonymity could be pierced for five speakers' allegedly defamatory statements that were anonymously posted to various blogs.[12] In resolving this issue, the Ninth Circuit had to decide whether the circumstances warranted issuing writs of mandamus either to protect the speakers' identities or to require their disclosure in discovery.[13] While the court ultimately declined to issue either of the writs (leaving the district court ruling unaltered),[14] the court's analysis raises two key questions. First, does anonymous online speech deserve more or less protection than traditional anonymous speech? Second, what standard should courts apply to balance the interests of disclosing the anonymous defamers' identities with maintaining the First Amendment protections afforded to anonymous speakers?

This Note argues that the Ninth Circuit's decision in *Anonymous Online Speakers* answered both of these questions erroneously. First, the court suggested that anonymous online speech deserves less protection than other anonymous speech because the Internet's speed increases the likelihood that harm or lies will be perpetuated.[15]

9. Reno v. ACLU, 521 U.S. 844, 870 (1997).

10. *See, e.g.*, Doe I v. Individuals, 561 F. Supp. 2d 249 (D. Conn. 2008); Sony Music Entm't Inc. v. Does 1–40, 326 F. Supp. 2d 556 (S.D.N.Y. 2004); *In re* Subpoena Duces Tecum to Am. Online, Inc., 52 Va. Cir. 26 (2000), *rev'd on other grounds*, Am. Online v. Anonymous Publicly Traded Co., 542 S.E.2d 377 (Va. 2001).

11. *In re* Anonymous Online Speakers, 661 F.3d 1168 (9th Cir. 2011).

12. *Id*. at 1171.

13. *Id*.

14. *Id*.

15. *See id*. at 1176 (citing with approval the district court's recognition that the Internet has "great potential for irresponsible, malicious, and harmful communication").

The court's approach is problematic because it directly cuts against Supreme Court precedent suggesting that anonymous online speech should not be treated differently than other anonymous speech.[16] Second, despite pointing out the inconsistent standards used by other courts, the Ninth Circuit failed to articulate which standard should govern whether to disclose an anonymous speaker's identity in pretrial discovery.[17] The Ninth Circuit passed up a valuable opportunity to resolve some confusion—at least for the courts within its jurisdiction—with there being no direct Supreme Court precedent and numerous standards used by different courts.

This Note proceeds as follows. Part II provides the facts and procedural history of the Ninth Circuit's decision in *Anonymous Online Speakers*. Part III summarizes the three main areas of analysis in the Ninth Circuit's opinion. Part IV analyzes two major problems with the Ninth Circuit's decision. It argues that the court should have treated anonymous online speech the same as other forms of anonymous online speakers' identities, preferably the prima facie case standard. Finally, Part V offers a brief conclusion.

II. FACTS AND PROCEDURAL HISTORY

Quixtar, a multilevel-marketing business run by independent business owners, distributes a variety of products to consumers (cosmetics, nutritional supplements, etc.).[18] TEAM, LLC, founded by two Quixtar independent business owners, provided support materials, gave business trainings, and even sold products to Quixtar.[19] In 2007, problems arose between Quixtar and TEAM, resulting in several lawsuits between the two companies.[20] In one of these lawsuits, Quixtar alleged that TEAM conducted a smear campaign against Quixtar in order to encourage Quixtar's independent business owners to leave "and join a competing multilevel marketing company affiliated with TEAM."[21] This alleged "campaign" consisted of at least five anonymous statements posted

16. *See infra* Part IV.A.
17. *See In re* Anonymous Online Speakers, 661 F.3d at 1174–78.
18. *Id.* at 1171–72.
19. *Id.* at 1172.
20. *Id.*
21. *Id.*

on different blogs.[22] These statements formed the basis for Quixtar's claims against TEAM for "tortious interference with existing contracts and with advantageous business relations."[23]

The case became interesting, however, when Quixtar deposed TEAM's Online Content Manager, Dickie.[24] Dickie refused to answer questions about the identity of some of the anonymous online speakers.[25] After examining the statements made on each blog, the district court ordered Dickie to testify about the identity of three of the speakers.[26] To prevent this testimony, the anonymous speakers filed a petition for a writ of mandamus to block the court's order.[27] Quixtar opposed the petition and cross-petitioned for a writ of mandamus to compel the court to require Dickie to testify about the other two speakers.[28]

III. THE COURT'S DECISION

The Ninth Circuit originally ruled on the petition for writ of mandamus in July 2010,[29] but the court withdrew its opinion and issued a new one in January 2011.[30] This later opinion denied both Quixtar's and the anonymous speakers' petitions for writs of mandamus, ultimately leaving the district court decision untouched.[31] The Ninth Circuit's analysis focused on three major elements: (1) general First Amendment doctrine and the various levels of protection given to different types of speech;[32] (2) how a

22. *Id*. The blogs were associated with TEAM, Quixtar, or multilevel marketing in some way, such as the "Integrity is TEAM" blog and the "IBO Rebellion" blog (referring to the way Quixtar ran its business through "Independent Business Owners"). *Id*. at 1171–72.

23. *Id*. at 1172.

24. *Id*.

25. *Id*.

26. *Id*.

27. *Id*.

28. *Id*.

29. *In re* Anonymous Online Speakers, 611 F.3d 653 (9th Cir. 2010), *withdrawn and superseded by* 661 F.3d 1168 (9th Cir. 2011).

30. *In re* Anonymous Online Speakers, 661 F.3d at 1168. The most substantial difference between the withdrawn opinion and the one that superseded it is that in the latter, the court explicitly declined to decide if the speech at issue constituted commercial speech. *Compare In re* Anonymous Online Speakers, 611 F.3d at 661, *with In re* Anonymous Online Speakers, 661 F.3d at 1177.

31. *In re* Anonymous Online Speakers, 661 F.3d at 1171.

32. *Id*. at 1172–73.

petition for mandamus heightens the standard of review in First Amendment contexts;[33] and (3) the standard that courts use to evaluate whether to allow discovery of anonymous speakers' identities.[34] The Ninth Circuit ultimately held that, even if the district court had applied the wrong standard in deciding whether to allow the speakers' identities to be discoverable, that error would not constitute "clear error" sufficient to issue a writ of mandamus for either party.[35]

First, the Ninth Circuit summarized First Amendment jurisprudence by articulating the contours of various levels of speech protection. The court gave due deference to the principle that "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment."[36] The court also added that "online speech stands on the same footing as other speech—there is 'no basis for qualifying the level of First Amendment scrutiny that should be applied' to online speech."[37] The Ninth Circuit used the Supreme Court's language from *Reno v. ACLU*[38] and appeared to follow precedent. But the court actually undermined precedent because its application to anonymous online speech may strip the speech of much of its protection.[39] The Ninth Circuit appeared to admit that online speech did not deserve as much protection as other anonymous speech when it approved the district court's conclusion that the Internet has "great potential for irresponsible, malicious, and harmful communication and that particularly in the age of the Internet, the speed and power of internet technology makes it difficult for the truth to 'catch up' to the lie."[40]

33. *Id*. at 1174–75, 1177.

34. *Id*. at 1174–78.

35. *Id*. at 1176–78.

36. *Id*. at 1173 (quoting McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 342 (1995)) (internal quotation marks omitted).

37. *Id*. (quoting Reno v. ACLU, 521 U.S. 844, 870 (1997)).

38. *Reno*, 521 U.S. 844.

39. *See infra* Part IV.

40. *In re* Anonymous Online Speakers, 661 F.3d at 1176 (internal quotation marks omitted). This is addressed further *infra* Part IV.A.

The Ninth Circuit also explained that the degree of protection that speech receives under the First Amendment varies according to the expressive interest at stake.[41] The spectrum of protection ranges from highly protected (and by implication highly valued) political speech, to lesser-protected speech such as commercial speech, and finally to unprotected speech such as fighting words and obscenity.[42] While commercial speech, like the speech in this case, might deserve less protection, the Ninth Circuit also added that "[t]he specific circumstances surrounding the speech serve to give context to the balancing exercise."[43] This means that anonymous online speech could potentially receive less protection than traditional anonymous speech simply because the Internet can magnify the harmful effects of defamatory speech.

Second, the Ninth Circuit addressed the standard for evaluating mandamus petitions. In granting a petition for a writ of mandamus, the Ninth Circuit employs a multifactor balancing approach,[44] weighing the following five factors:

> (1) whether the petitioner has no other means, such as a direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in any way not correctable on appeal; (3) whether the district court's order is clearly erroneous as a matter of law; (4) whether the district court's order is an oft repeated error or manifests a persistent disregard of the federal rules; and (5) whether the district court's order raises new and important problems or issues of first impression.[45]

Although the court mentioned that each factor is relevant for its analysis, the court put special emphasis on the third factor—clear error—which is the only prong that can be dispositive.[46] This was critical to the court's opinion because the Ninth Circuit ultimately

41. *In re* Anonymous Online Speakers, 661 F.3d at 1173.

42. *Id*.

43. *Id*. at 1177.

44. The Ninth Circuit first articulated its multi-factor balancing approach to evaluating mandamus petitions in *Bauman*. *See* Bauman v. U.S. Dist. Court, 557 F.2d 650, 654–55 (9th Cir. 1977).

45. *In re* Anonymous Online Speakers, 661 F.3d at 1174 (citing *Bauman*, 557 F.2d at 654–55).

46. *Id*.

upheld the district court's decision after expressly analyzing only the clear-error factor.[47]

Finally, after determining the broad standard of review for the writ-of-mandamus issue, the Ninth Circuit discussed the various standards that could be applied to determine whether the identities of anonymous speakers should be disclosed in discovery.[48] But the court ultimately left district courts without clear guidance on which test is most appropriate, instead suggesting that a vague balancing test should be used. This test weighs the importance of the anonymous speech involved (including the nature of the speech) against the need for relevant discovery.[49]

The court concluded that although the district court may have applied the wrong standard to the anonymous speech, its decision was not the clear error required to grant a writ of mandamus.[50] Thus, the court dodged some of the major issues in the case.

IV. ANALYSIS

The Ninth Circuit's decision in *In re Anonymous Online Speakers* shows the difficulty of balancing the interests of disclosing anonymous speakers' identities (so that a lawsuit can be adjudicated) with protecting the First Amendment right to anonymous speech. While this balancing is inherently difficult, the Ninth Circuit made two errors in its analysis. First, the Ninth Circuit undermined protections that the Supreme Court had established for anonymous online speech by suggesting that online anonymity potentially deserves less protection than traditional anonymity. Second, the court failed to articulate a clear governing standard to determine when a court may order the identity of an anonymous online speaker to be revealed. Despite recognizing the existing split among courts, the Ninth Circuit avoided taking a side and left the courts within its jurisdiction without clear guidance. This Note argues that the court should have made it clear that anonymous online speech is protected the same as other anonymous speech. The court also should have adopted the prima-facie-case standard to determine if disclosure of

47. *Id.* at 1177.
48. *Id.* at 1175–76.
49. *Id.* at 1176.
50. *Id.* at 1177.

an online speaker's identity was warranted. Alternatively, the court could have enunciated a clear standard to fully delineate where the rights of anonymous online speakers lie—thus avoiding the chilling effects from a multitude of standards.

A. The Ninth Circuit Undermined Anonymous-Online-Speech Protection

The Supreme Court in *Talley v. California* originally articulated the First Amendment protection for anonymous speech.[51] That case involved a city ordinance that prohibited people from distributing handbills that did not include the speaker's name and address.[52] In striking down the ordinance, the Court reasoned that a new doctrine needed to be carved out because "[t]here can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression."[53] Arguably, this chilling effect is the primary justification for protecting anonymous speech.[54] The Court does not want to punish speakers who have an unpopular message by forcing them to personally and publicly present that message. Granting protection to anonymous speech certainly has the potential to grant parties a license to express harmful views without fear of retribution. However, the Court has decided that the freedom of expression outweighs these concerns.[55]

Since *Talley*, the Supreme Court has consistently protected anonymous speech. For example, in *McIntyre v. Ohio Elections Commission*,[56] the Court considered a similar situation to *Talley*. Ohio had passed a statute that prohibited people from distributing anonymous campaign literature.[57] When a person seeking to

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

52. *Id*. at 60–61.

53. *Id*. at 64.

54. *See* Eric M. Freedman, *Reconstructing Journalists' Privilege*, 29 CARDOZO L. REV. 1381, 1382 (2008).

55. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341–42 (1995) ("The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, . . . the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry.").

56. *Id*.

57. *Id*. at 338 n.8.

propagate anonymous speech through unsigned leaflets challenged the law, the Supreme Court affirmed the *Talley* principles by extending its holding "beyond the literary realm" to the advocacy of political causes.[58] The Court justified its holding because anonymity "provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent."[59] By allowing anonymous speech to retain its protection in contexts beyond the traditional literary realm, the Court affirmed its commitment to further public dialogue by allowing ideas to be presented apart from their speaker.

As mentioned above, the Supreme Court has noted that there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to [online speech]."[60] However, the Court decided that case in the context of regulating pornography on the Internet; the case did not involve anonymous speech.[61] In actuality, the Court has yet to decide a case relating to anonymous online speech. However, to further open dialogue and the ongoing vast discussion of ideas online,[62] the Court should be just as willing to protect anonymous online speech as it is to protect traditional pamphleteering.[63] More people have access to voice their opinions and spread their ideas if the Court strays far from any chilling effect that anonymous online speech regulation can have. The Internet truly offers the opportunity for all speakers to be heard on an equal ground, regardless of resources. In contrast, anonymous speech through traditional handbilling and pamphleteering lacks the reach and general availability that the Internet affords.[64] This new medium for "town criers" and pamphleteers should be celebrated and

58. *Id*. at 342.

59. *Id*.

60. Reno v. ACLU, 521 U.S. 844, 870 (1997).

61. *Id*.

62. *See* Jane S. Schacter, *Digitally Democratizing Congress? Technology and Political Accountability*, 89 B.U. L. REV. 641 (2009) (discussing the prominence of social media in political discussions and campaigns).

63. The Court in *Reno* (early in the Internet's development) appeared very willing to let the Internet welcome a new age of easy access to free speech. *See Reno*, 521 U.S. at 870 ("Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.").

64. *See* Doe v. 2TheMart.com Inc., 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001).

protected—at least as much as speech in traditional mediums—as a way to further freedom of expression.

The Ninth Circuit implicitly reached the opposite conclusion. Although the Ninth Circuit recognized that the Supreme Court has stated (albeit in other contexts) that online speech should not be treated different from other types of speech, the Ninth Circuit in *Anonymous Online Speakers* simultaneously suggested that online speech might deserve less protection. When discussing whether to disregard the speakers' anonymity in this case, the court approvingly cited the district court's evaluation of the value of anonymous online speech:

> The district court here appropriately considered the important value of anonymous speech balanced against a party's need for relevant discovery in a civil action. It also recognized the "great potential for irresponsible, malicious, and harmful communication" and that particularly in the age of the Internet, the "speed and power of internet technology makes it difficult for the truth to 'catch up' to the lie."[65]

The Ninth Circuit's reasoning undercuts the rationales for free speech doctrines in general, and the purpose for protecting anonymous speech in particular. While anonymous online speech is certainly subject to abuse, the Supreme Court recognized similar potential in *Talley* and *McIntyre* when the rule was being developed and applied. These harms are balanced out by allowing limited disclosure of an anonymous speaker's identity based on the level of proof available that the speaker's conduct is actionable.[66] Ultimately, this balancing needs to occur to ensure that anonymous speech has enough protection that it will not be chilled by unmasking speakers' identities without sufficient proof of wrongdoing. Further, the online nature of speech should not be included in this balancing.[67]

65. *In re* Anonymous Online Speakers, 661 F.3d 1168, 1176 (9th Cir. 2011) (quoting Quixtar Inc. v. Signature Mgmt. Team, LLC, 566 F. Supp. 2d 1205, 1214 (D. Nev. 2008)).

66. *See* Musetta Durkee, Note, *The Truth Can Catch the Lie: The Flawed Understanding of Online Speech in* In Re Anonymous Online Speakers, 26 BERKELEY TECH. L.J. 773, 775 (2011) ("When faced with discovery requests and subpoenas to unmask anonymous speakers' identities, courts must weigh the harmed parties' rights to redress against the anonymous online speakers' Constitutional rights of speech."). The various standards that courts have adopted are discussed *infra* Part IV.B.

67. *See* Durkee, *supra* note 66, at 776 ("[T]he Ninth Circuit . . . mistakenly

In addition to suggesting that online speech has the potential to be especially harmful, the Ninth Circuit reasoned that the truth might lag behind a lie in the context of anonymous online speech.[68] The court did not attempt to explain why this might be, but the idea relates to one of the justifications for protecting free speech: the marketplace of ideas.[69] The marketplace of ideas posits that society is a marketplace where ideas compete for acceptance.[70] Some of these ideas are true and others are false. Ultimately, the good and true ideas will be sorted out from the lies, and truth will prevail.[71] The Ninth Circuit appears to suggest that when false ideas are propagated online, the marketplace of ideas is unable to correct itself because the false ideas can travel quickly in cyberspace. While this concern is understandable, although not necessarily correct,[72] the alternative is to blot out the speaker's opinion from the beginning. It is better to accept any potentially undesirable lag in the marketplace of ideas, which still functions online, than to censor speakers in the name of truth. The Ninth Circuit was incorrect to suggest that the nature of online speech, particularly as it relates to the marketplace of ideas, should be factored in to deprive anonymous online speakers of adequate protection for their ideas.

As a concluding thought, it is entirely possible that the Ninth Circuit did not intend to approvingly cite the district court's reasoning to suggest that online speech is less deserving of protection. Hopefully, the Ninth Circuit actually disagreed with the reasoning of the district court. However, the Ninth Circuit's language was sufficiently ambiguous that it could still have serious chilling effects on anonymous online speech. If the Ninth Circuit disagreed with the decision of the district court, the court easily

characterized the online nature of the defendant's speech as a separate factor in the . . . balancing test, finding that the allegedly harmful speech occurred on the Internet inherently weighed against the anonymous speaker.").

68. *In re* Anonymous Online Speakers, 661 F.3d at 1176.

69. *Cf.* Maurice E. Stucke & Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L.J. 249, 249 (2001).

70. *Id.*

71. *Id.*

72. *See* MADELEINE SCHACHTER & JOEL LAURENCE KURTZBERG, LAW OF INTERNET SPEECH 454 (3d ed. 2008) ("[T]he recipients of [offensive online] statements do not necessarily attribute the same level of credence to the statements that they would accord to statements made in other contexts.").

could have made clear that the district court was incorrect. Also, the court could have chosen not to restate the district court's reasoning. Instead, by quoting the district court's reasoning without additional commentary *and* by upholding the district court's decision, the Ninth Circuit appeared to approve and perpetuate the district court's flawed reasoning, which undermines protections given to anonymous online speech.

B. Chilling Standards for Anonymous Online Speech

One of the keys to making our laws effective is to give them a semblance of consistency that will allow individuals to confidently order their behavior around those laws.[73] In the First Amendment context, consistent laws are especially important to ensure that protected speech is not "chilled," as when people overly restrict their own expression to ensure they will not be punished. The Supreme Court has gone to great lengths to establish this principle.[74] The Court has generally adopted flexible balancing tests over bright-line rules in the First Amendment context to ensure that the law does not unintentionally silence protected speech; this approach allows the free speech doctrine to grow and change as society needs.[75] But courts that have applied these principles in the anonymous speech context have gone on to adopt a number of different approaches that are far from consistent and only as flexible as the individual judge's policy preferences permit.

In *In re Anonymous Online Speakers*, the Ninth Circuit considered the state of the law in various jurisdictions before announcing the standard it would use to determine whether interests in discovering a speaker's identity outweighed that speaker's

73. Kaimipono David Wenger, *Reparations Within the Rule of Law*, 29 T. JEFFERSON L. REV. 231, 242 (2007) (extolling the benefits of the rule of law).

74. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 340–41 (1974) (relating that speech restrictions must clear certain requirements so that protected speech will not be self-censored).

75. *See, e.g.*, Terry Nicole Steinberg, *Rival Union Access to Public Employees: A New First Amendment Balancing Test*, 2 GEO. MASON L. REV. 361, 361 (1994) (discussing the Court's balancing test to reconcile the "tensions between the First Amendment and labor relations in the public sector"); Anthony N. Moshirnia, Note, *The* Pickering *Paper Shield: The Erosion of Public School Teachers' First Amendment Rights Jeopardizes the Quality of Public Education*, 16 B.U. PUB. INT. L.J. 313, 320 (2007) (discussing the Court's *Pickering* balancing test for public employees' First Amendment rights to free expression).

anonymous speech interests.[76] This section shows the confusion resulting from the various standards that courts have used. Despite recognizing this split in opinion among courts, the Ninth Circuit failed to adopt one of the standards to clear up some confusion.

As the Ninth Circuit pointed out, the least-protective courts have declined to create or adopt a new standard for anonymous online speech. Instead, they have used only traditional state discovery rules to determine whether anonymous speakers' identities should be disclosed.[77] The virtue of taking this approach is that it minimizes the number of potentially applicable standards (and possible confusion) in an anonymous speech case, and arguably, traditional discovery rules could protect the same interests.[78] However, anonymous speech is of such importance that it deserves separate protection and a consistent standard to protect it. Allowing each state's discovery rules to govern the disclosure of anonymous speakers' identities could create so many different standards that speech could be chilled out of fear that another state's laws might leave the anonymous utterance unprotected.

The next step up from no separate protection is to evaluate the speech and discovery interests under the "motion to dismiss or good faith standard."[79] While this standard may be clearer than developing a new standard, its low bar for protecting the identities of anonymous online speakers presents a significant risk of chilling anonymous speech. Although the anonymous speaker will retain the opportunity to challenge the lawsuit on its merits and may still prevail on freedom of expression grounds, disclosing the speaker's identity to her accusers results in irreversible damage. Thus, a standard set so low would invite frivolous litigation designed solely to discover the identities of anonymous speakers.

76. *In re* Anonymous Online Speakers, 661 F.3d at 1176.

77. *Id*. at 1175 (citing Klehr Harrison Harvey Branzburg & Ellers, LLP v. JPA Dev., Inc., No. 0425, 2006 WL 37020, at *8 (Pa. Ct. Com. Pl. Jan. 4, 2006)).

78. *See* Michael S. Vogel, *Unmasking "John Doe" Defendants: The Case Against Excessive Hand-Wringing over Legal Standards*, 83 OR. L. REV. 795, 801 (2004).

79. *In re* Anonymous Online Speakers, 661 F.3d at 1175 (citing Columbia Ins. Co. v. seescandy.com, 185 F.R.D. 573 (N.D. Cal. 1999); *see also In re* Subpoena Duces Tecum to Am. Online, Inc., 52 Va. Cir. 26 (2000), *rev'd on other grounds*, Am. Online v. Anonymous Publicly Traded Co., 542 S.E.2d 377 (Va. 2001)).

Some courts have adopted a standard that is higher than the motion-to-dismiss standard but lower than the prima-facie-case standard.[80] Although this exact standard avoids clear classification and arguably provides more protection than the motion-to-dismiss standard, a lack of guidelines makes this standard somewhat arbitrary and unable to adequately protect anonymous speakers' rights.

The next clear standard appears to be the prima-facie-case standard.[81] Under this approach, the plaintiff must make out a "prima facie showing of the claim for which the plaintiff seeks the disclosure of the anonymous speaker's identity."[82] This standard is adequate to protect anonymous online speech and is the standard that the Ninth Circuit should have adopted for cases that do not involve political speech. The prima-facie-case standard requires sufficient evidence of wrongdoing to support a cause of action but also does not require as much evidence as a motion for summary judgment. By using the prima-facie-case standard appropriately, the court can balance the interests in free expression against the need to discover online speakers' identities. The court does so with the balance in favor of the anonymous speaker but without being too exacting to allow truly defamatory speech to go unpunished.

Finally, the standard that the district court in *Quixtar Inc. v. Signature Management Team, LLC* adopted is the most exacting standard that courts have applied.[83] This standard, established by the Delaware Supreme Court in *Doe v. Cahill*,[84] "requires plaintiffs to be able to survive a hypothetical motion for summary judgment and give, or attempt to give, notice to the speaker before discovering the anonymous speaker's identity."[85] Requiring such a high standard merely to obtain the identity of an opposing party may seem excessive; however, the Ninth Circuit was quick to point out that

80. *In re* Anonymous Online Speakers, 661 F.3d at 1176 (citing Sedersten v. Taylor, No. 09-3031-CV-S-GAF, 2009 WL 4802567 (W.D. Mo. Dec. 9, 2009); Enterline v. Pocono Med. Ctr., 751 F. Supp. 2d 782 (M.D. Pa. 2008); Doe v. 2TheMart.com Inc., 140 F. Supp. 2d 1088 (W.D. Wash. 2001)).

81. *Id*. at 1175.

82. *Id*. (citing Doe I v. Individuals, 561 F. Supp. 2d 249 (D. Conn. 2008); Highfields Capital Mgmt., LP v. Doe, 385 F. Supp. 2d 969 (N.D. Cal. 2005); Sony Music Entm't, Inc. v. Does 1–40, 326 F. Supp. 2d 556 (S.D.N.Y. 2004)).

83. *Id*.

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

85. *In re* Anonymous Online Speakers, 661 F.3d at 1176.

such an exacting standard was justified in *Cahill* because political speech (which receives increased First Amendment protection) was at issue in that case.[86] Additionally, because the Supreme Court has already accepted that the anonymous speech doctrine leaves some misbehavior unpunished, this high standard is appropriate when the speech's value is especially high, such as it is with political speech. However, to require such a strong showing in other situations would overbalance free speech interests against the legitimate need for disclosure.

Evaluating each of these standards separately demonstrates that each has significant weaknesses in its application. However, given the nature of the speech at issue in this case, the Ninth Circuit should have adopted the prima-facie-case standard because it best balances the importance of anonymous online speech against the lesser interest in disclosure.

Rather than adopt the prima-facie-case standard, the Ninth Circuit made the mistake of not adopting any standard at all. Even conclusively adopting a lesser standard would have been preferred because it would have provided more protection than the current hodgepodge of standards. Allowing judges the discretion to choose between competing standards only exacerbates the problem. A judge who favors full civil discovery, or one who is critical of the potentially malicious nature of anonymous online speech, will tend to choose a lesser standard. When individuals do not know what standard will apply to their anonymous online speech, they will not know where their First Amendment protections lie. As such, speakers who are conscious of the law might stay far from the dividing line of protected and unprotected speech, which has the potential to chill fully protected speech. This harm can be corrected only by announcing a single standard to decide when anonymous online speakers' identities will be protected. The Ninth Circuit passed up a good opportunity to be the first circuit court to announce a solid standard on this issue. Instead, the Ninth Circuit has advanced the confusion and virtually ensured that this problem will remain until the Supreme Court can conclusively resolve it.

86. *Id.* at 1176–77.

V. CONCLUSION

Anonymous speech has been a historically protected right under the First Amendment. It has been justified as a way to avoid potential chilling effects on freedom of expression and a way to allow unpopular speakers to speak without having others prejudge their message based on who they are. The Internet has increased the use and value of anonymous speech by allowing all people the opportunity to speak their minds without disclosing their identities. With this expansion in online speech, modern courts have been left with the challenge to balance the need for disclosure of anonymous speakers' identities against the chilling effect that such disclosure has.

Courts have attempted to tackle these problems but have created a hodgepodge of inconsistent standards that have a distinct chilling effect beyond what a single standard would necessarily provide. The Ninth Circuit's recent opinion in *In re Anonymous Online Speakers* has only added to the confusion. Rather than extend Supreme Court precedent to grant equal protection to anonymous speech both online and offline, the Ninth Circuit has suggested that anonymous online speech may be less deserving of protection. If not contrary to the Supreme Court's command, the Ninth Circuit's decision is certainly contrary to the policies underlying the First Amendment and the anonymous speech doctrine.

Further, the Ninth Circuit has failed to announce a workable solution to balance anonymous speech interests against interests in disclosing speaker identity. The Ninth Circuit should have adopted the prima-facie-case standard, which provides a good balance but still favors protecting anonymous online speech. Rather, the Ninth Circuit's opinion has given little guidance to district courts. Each court may create its own standards, based upon its judge's personal preferences, awaiting eventual Supreme Court intervention to provide a clear standard. Overall, the Ninth Circuit's opinion has greatly added to the chilling effects that encumber this area of First Amendment law.

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