NO. 16-2188

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SIGNATURE MANAGEMENT TEAM, LLC,
PLAINTIFF-APPELLANT,

v.

JOHN DOE,
DEFENDANT-APPELLEE.

On Appeal from the
United States District Court for the Eastern District of Michigan at Ann Arbor
Case No. 13-cv-14005

The Honorable Judith E. Levy, United States District Court Judge

BRIEF OF *AMICUS CURIAE* ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF DEFENDANT-APPELLEE

Aaron Mackey
Sophia Cope
Adam Schwartz
Andrew Crocker
Mitch Stoltz
Daniel Nazer
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
Email: amackey@eff.org
Telephone: (415) 436-9333

Counsel for Amicus Curiae

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amicus Curiae* Electronic Frontier Foundation ("EFF"), a 501(c)(3) non-profit corporation incorporated in the State of Massachusetts, makes the following disclosure.

1. *Amicus* is neither a publicly held corporation, nor a subsidiary or affiliate of a publicly owned corporation.

2. *Amicus* states that there is not a publicly owned corporation, not a party to the appeal that has a financial interest in the outcome.

3. No publicly held corporation or other publicly held entity owns 10% or more of *Amicus*.

/s/ Aaron Mackey January 17, 2017
Aaron Mackey
Electronic Frontier Foundation

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Constitutional Provisions

STATEMENT OF INTEREST[1]

Amicus curiae Electronic Frontier Foundation (EFF) is a member-supported, non-profit civil liberties organization that works to protect free speech and privacy in the digital world. Founded in 1990, EFF has more than 33,000 dues-paying members. EFF represents the interests of technology users in both court cases and broader policy debates surrounding the application of law to technology.

The issue in this case—whether the district court properly preserved Doe's anonymity—touches on a significant issue central to EFF's work: the First Amendment's protections for anonymous online speakers.

EFF has repeatedly represented anonymous online speakers and appeared as *amicus curiae* in cases where the First Amendment's protections for anonymous speech are at issue. *See, e.g.*, *USA Technologies, Inc. v. Doe*, 713 F. Supp. 2d 901 (N.D. Cal. 2010) (serving as counsel to Doe); *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 770 S.E.2d 440 (Va. Sup. Ct. 2015) (serving as *amicus curiae* in support of anonymous speaker); *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001) (serving as counsel to Doe).[2]

---

[1] Pursuant to Federal Rule of Appellate Procedure Rule 29(a)(4)(E), EFF certifies that no person or entity, other than *Amicus*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part.

[2] A complete list of anonymous speech cases EFF has participated in is available at https://www.eff.org/issues/anonymity.

INTRODUCTION

The First Amendment's shield for anonymous speakers requires courts to balance litigants' needs to unmask online speakers against speakers' interests in maintaining their anonymity. This balancing should occur throughout all stages of the case, and it empowers courts to craft discovery and other orders that protect speakers' identities without prejudicing other parties or otherwise denying them information they need to litigate their cases.

The balancing test required by the First Amendment extends to post-liability requests to unmask anonymous speakers. Even when plaintiffs prevail against anonymous speakers—such as the copyright infringement finding here—they are not automatically entitled to unmask those speakers.

In this case, the trial court repeatedly balanced Plaintiff's asserted need for Doe's identity against Doe's right to anonymity. The court correctly concluded at each stage of the case that the purported interest in identifying Doe did not outweigh the harm should Doe be unmasked. The trial court did not abuse its discretion in so ruling.

Additionally, although the First Amendment right of access to judicial records and proceedings is an important right, it is not absolute. It is a presumption that can yield to other interests, including competing First Amendment rights such as Doe's right to anonymity in this case.

Amicus asks this Court to affirm the district court's rulings that Doe should not be unmasked. Further, this Court should adopt a rule that requires trial courts to balance—throughout all stages of litigation—the purported litigation needs of parties seeking to unmask against the First Amendment's protections for anonymous speakers. This rule finds ample support in multiple cases upholding the right to speak anonymously in the face of demands to unmask those speakers. It also finds support in the qualified First Amendment discovery privilege and the equitable balancing courts employ when considering whether to issue an injunction.

ARGUMENT

I. THE FIRST AMENDMENT PROVIDES STRONG PROTECTION FOR ANONYMOUS SPEAKERS.

The First Amendment protects anonymous speakers. Our founders believed that anonymous speech was an essential tool to provide critical commentary and to foster public debate. Many people today speak anonymously for the same reasons. Although anonymous speakers do not enjoy an absolute right to keep their identity secret, the First Amendment ensures that they are not unmasked without good reason. The First Amendment thus acts as a bar against vexatious litigation designed to simply silence, harass, or intimidate anonymous speakers. It further requires that when parties legitimately seek anonymous speakers' identities, the unmasking must be *necessary*. This is because loss of anonymity irreparably harms speakers and can impose severe consequences on their speech while also chilling other speakers.

A. The First Amendment Right to Anonymous Speech is an Historic and Essential Means of Fostering Robust Debate.

The right to speak anonymously is deeply embedded in the political and expressive history of this country. Allowing individuals to express their opinions unmoored from their identity encourages participation in the public sphere by those who might otherwise be discouraged from doing so. The Supreme Court has recognized that anonymous speech is not some "pernicious, fraudulent practice,

but an honorable tradition of advocacy and of dissent." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995).

Anonymity is often a "shield from the tyranny of the majority." *Id.* "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." *Id*. at 341-42. Indeed, our founders relied on anonymity in advocating for independence before the Revolutionary War and later when publishing the Federalist Papers as they debated our founding charter. *See Talley v. California*, 362 U.S. 60, 64-65 (1960).

For the same reasons, people today regularly use anonymity to speak online. Anonymity has become an essential feature of our online discourse. "Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas. The ability to speak one's mind on the Internet without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate." *2TheMart.com Inc.*, 140 F. Supp. 2d at 1092; *see also Doe v. Harris*, 772 F.3d 563, 580 (9th Cir. 2014) (holding that a law requiring unmasking of certain anonymous speakers chilled online speech); *Art of Living v. Does*, 2011 WL 3501830 *2 (N.D. Cal. Aug. 10, 2011) (*Art of Living I*) ("Indeed, courts have recognized that the Internet, which is a particularly effective forum for the dissemination of anonymous speech, is a valuable forum for robust exchange and

debate."); *Quixtar Inc. v. Signature Mgmt. Team, LLC*, 566 F. Supp. 2d 1205, 1214 (D. Nev. 2008) (noting that with anonymous online speech, "ideas are communicated that would not otherwise come forward").

B. Plaintiffs Often Use Litigation as a Pretext to Unmask, and Then Silence, Anonymous Speakers.

Litigants who do not like the content of Internet speech by anonymous speakers may seek their identities to punish or silence them, rather than vindicate substantive rights or pursue legitimate claims. As the court in *Dendrite Int'l v. Doe No. 3*, 775 A.2d 756, 771 (N.J. App. Div. 2001), recognized, procedural protections for anonymous speakers are needed to ensure that litigants do not misuse "discovery procedures to ascertain the identities of unknown defendants in order to harass, intimidate or silence critics in the public forum opportunities presented by the Internet." Similarly, the court in *Doe v. Cahill*, 884 A.2d 451, 457 (Del. Sup. Ct. 2005) stated, "there is reason to believe that many defamation plaintiffs bring suit merely to unmask the identities of anonymous critics."

Amicus has witnessed these tactics firsthand. Litigants often bring suits that seek to unmask anonymous speakers to punish, humiliate, or retaliate with the ultimate goal of silencing their speech. Thankfully, courts have recognized the harm that would flow from summarily unmasking speakers without first considering whether there is an important need to do so.

For example, USA Technologies, Inc. targeted an anonymous Yahoo!

message board user, "Stokklerk," who had characterized the company's high executive compensation as "legalized highway robbery" and "a soft Ponzi." Even though USA Technologies could not prove that these posts were anything but constitutionally protected opinion, it issued a subpoena to Yahoo! to uncover Stokklerk's identity. *Amicus*, as counsel for the anonymous speaker, brought a motion to quash. The court agreed, recognizing "the Constitutional protection afforded pseudonymous speech over the internet, and the chilling effect that subpoenas would have on lawful commentary and protest." *USA Technologies*, 713 F. Supp. at 906.

In another case, Jerry Burd, the superintendent of the Sperry, Oklahoma, school district, sued anonymous speakers who criticized him on an online message board. Burd filed a subpoena seeking to unmask the speakers. When *amicus* intervened on behalf of the site operator and a registered user, Burd immediately dropped the subpoena. This indicates that Burd did not have a meritorious claim, and presumably was using the legal system simply to unmask the speakers.[3]

The use of harassing subpoenas is also a common tactic in online copyright infringement litigation. For example, the holders of copyright on adult movies often file mass lawsuits based on minimal evidence of copyright infringement stemming from the downloading of a pornographic film, improperly joining dozens

[3] *Anonymity Preserved for Critics of Oklahoma School Official,* EFF (July 19, 2006), https://www.eff.org/press/archives/2006/07/18.

of defendants in a single suit regardless of where their Internet Protocol addresses indicate they live. The copyright holders seek to leverage the risk of embarrassment associated with pornography, as well as the accompanying costs of litigation, to coerce settlement payments of several thousand dollars from each of these individuals, despite serious problems with the underlying claims. These suits are rarely litigated to judgment. Once the rights-holders obtain the identities of Internet subscribers through subpoenas to their Internet service providers, the cases generally proceed no further. The D.C. Circuit recognized the illegitimacy of these tactics. *See AF Holdings, LLC v. Does 1-1058*, 752 F.3d 990, 992 (D.C. Cir. 2014) (criticizing "porno-trolling" tactics targeting anonymous downloaders en masse).[4]

Moreover, courts have held that plaintiffs who sue for copyright infringement cannot ignore First Amendment values protecting anonymity. *See Arista Records, LLC v. Doe 3,* 604 F.3d 110, 119 (2d Cir. 2010) (weighing the qualified First Amendment discovery privilege in copyright infringement case).

C. Unmasking is Harmful and Can Chill Speech.

Unmasking anonymous speakers is harmful in at least three ways.

[4] In December 2016, federal officials indicted two attorneys who filed many such copyright infringement suits. Officials accuse the pair of committing fraud, perjury, and money laundering as part of a massive extortion scheme that leveraged the fear of being associated with pornography viewing into quick settlements. Joe Mullin, *Prenda Law "copyright trolls" Steele and Hansmeier arrested*, Ars Technica (Dec. 16, 2016), http://arstechnica.com/tech-policy/2016/12/breaking-prenda-law-copyright-trolls-steele-and-hansmeier-arrested/.

First, the disclosure of anonymous speakers' identities can irreparably and directly harm them. *Art of Living v. Does 1-10*, 2011 WL 5444622 *9 (N.D. Cal. Nov. 9, 2011) (*Art of Living II*) (citing *McIntyre*, 514 U.S. at 342). At minimum, unmasking can hinder speakers' effectiveness because it directs attention to their identities rather than the content of their speech. In *Highfields Capital Mgmt., L.P. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2005), the court recognized that "defendant has a real First Amendment interest in having his sardonic messages reach as many people as possible – and being free to use a screen name . . . carries the promise that more people will attend to the substance of his views." *Id*. at 980.

Further, unmasking is harmful to speakers when their true identities are unpopular, as others may be more dismissive of the speakers' statements, and speakers may be chilled from continuing to speak publicly on that same topic. *See Harris*, 772 F.3d at 581 (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.") (internal quotations omitted). Also, when a pseudonymous speaker is unmasked, they will often lose their built-up audience, and it will often be difficult for them to rebuild a comparable audience with either their true identity or a new pseudonymous identity. Unveiling speakers' true identities thus "diminishes the free exchange of ideas guaranteed by the Constitution." *Art of Living II*, 2011 WL 5444622 at *9.

Second, unmasking the speaker can lead to serious personal consequences—for the speaker or even the speaker's family—including public shaming, retaliation, harassment, physical violence, and loss of a job. *See Dendrite*, 775 A.2d at 771 (recognizing that unmasking speakers can let other people "harass, intimidate or silence critics"). In the analogous context of identifying individuals' anonymous political activities, the Supreme Court has recognized how unmasked individuals can be "vulnerable to threats, harassment, and reprisals." *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87, 97 (1982).

Third, the harm of unmasking a specific speaker also has the potential to chill others' speech. In *Highfields*, the court held that would-be speakers on an online message board are unlikely to be prepared to bear such high costs for their speech. 385 F. Supp. 2d at 981. Thus, "when word gets out that the price tag of effective sardonic speech is this high, that speech will likely disappear." *Id*.

The harms to an anonymous speaker's First Amendment rights—and the implications for free and open debate generally—must be accounted for and protected by courts.

II. COURTS EMPLOY MULTIPLE BALANCING TESTS TO PROTECT ANONYMOUS SPEAKERS UNDER THE FIRST AMENDMENT.

To protect the substantive First Amendment right to speak anonymously, courts should employ a balancing test throughout all stages of a case, weighing the

need of the moving party to know a speaker's true identity against the harm of unmasking the speaker. The appropriateness of weighing competing interests to protect First Amendment anonymous speech rights is supported by the existence of balancing tests in other contexts—for example, the qualified First Amendment discovery privilege and the granting of injunctions.

A. This Court Should Adopt a Test for Unmasking Anonymous Speakers That Specifically Includes a Requirement For Courts to Balance the *Necessity* of Unmasking Against the Harm to the Speaker.

Recognizing the First Amendment rights at stake, many courts have developed a two-step test for determining when plaintiffs are entitled to unmask anonymous online speakers. *Highfields*, 385 F. Supp. 2d 969; *see also Dendrite*, 775 A.2d 756.

Step one requires plaintiffs to meet some significant evidentiary burden to show the legitimacy of their case, often characterized as a *prima facie* showing, prior to the actual merits stage of the case. *Highfields*, 385 F. Supp. 2d at 975-76. Although courts have employed a variety of evidentiary standards at this step, *amicus* believes the summary judgment standard properly provides the proper protection for anonymous speakers. *Id*. at 975. This Court, however, need not decide which particular standard is appropriate for this first step, because it is not presented in this appeal. Further, as explained below, even prevailing on the merits does not obviate the need for courts to employ the balancing test.

Step two requires courts, once plaintiffs meet their evidentiary burden, to balance competing interests. *See, e.g.*, *Dendrite*, 775 A.2d at 760; *Independent Newspapers, Inc. v. Brodie*, 966 A.2d 432 (Md. Ct. App. 2009); *Highfields*, 385 F. Supp. 2d at 976; *Mobilisa, Inc. v. Doe*, 170 P.3d 712, 720 (Ariz. App. 2007).[5]

Courts have distilled four interests they must analyze and balance to determine whether plaintiffs, even after meeting their evidentiary burden, can unmask anonymous speakers.

The plaintiffs' two interests are the strength of their case (usually as demonstrated by their evidentiary showing) and the necessity of disclosing speakers' identities. *Dendrite*, 775 A.2d at 760. The necessity inquiry includes whether there are less invasive discovery tools available that would satisfy plaintiffs' needs without unmasking anonymous speakers. *See Art of Living II*, 2011 WL 5444622 at *10 (describing discovery alternatives short of an in-person deposition that would unmask Doe, such as depositions by telephone or via written questions).

On the other side of the scale, courts must weigh the nature of the anonymous speech at issue in the case and the harm (or harms) that would result

[5] Inasmuch as *Cahill* holds that no further balancing is necessary should plaintiffs meet a summary judgment standard, *see* 884 A.2d 461, that proposition is dubious. First, such proceedings are inappropriate when there are disputed facts (such as the nature of the speech at issue). Second, without a balancing test, a court would fail to adequately scrutinize whether a plaintiff actually needs a speaker's identity.

from loss of anonymity.

Regarding the nature of the speech at issue, "the specific circumstances surrounding the speech serve to give context to the balancing exercise." *In re Anonymous Speakers*, 661 F.3d 1168, 1177 (9th Cir. 2011). Courts have found speakers have high First Amendment interests in anonymous political, religious, or literary speech. *See, e.g., Art of Living II*, 2011 WL 5444622 at *5-6 (finding critical commentary touched on matters of public concern). *Cf. Sony Music Entertainment, Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 564 (S.D.N.Y. 2004) (finding the speech interest in downloading music to be more limited).

Courts must also weigh the harms that result from unmasking speakers—specifically the concrete consequences described above in Section I.C.—and whether the disclosure will chill the speech of others. *See Art of Living II*, 2011 WL 5444622 at *7 ("[W]here substantial First Amendment concerns are at stake, courts should determine whether a discovery request is likely to result in chilling protected activity").

Analyzing these competing interests ensures that courts properly assess the "magnitude of the harms that would be caused by competing interests by a ruling in favor of plaintiff and by a ruling in favor of defendant." *Highfields*, 385 F. Supp. 2d at 976. Further, courts have recognized that focusing their analysis on the necessity of unmasking ensures parties have some justifiable, legitimate litigation

need for the information that outweighs the harm to an unmasked speaker. *See Art of Living II*, 2011 WL 5444622 at *6.

Although *amicus* is not aware of any cases applying the balancing inquiry after a party seeking to unmask has successfully established liability against an anonymous speaker, we believe the First Amendment interests animating the tests require courts to do so. The post-liability nature of a case does not obviate the need to apply the balancing test when considering an unmasking motion. Although a plaintiff may have won on the merits and therefore, by definition, have a strong case, even successful plaintiffs may be using litigation to chill or silence speech with which they disagree. Thus, courts must still consider the nature of the underlying speech and the plaintiff's *need* to unmask anonymous speakers.

The plaintiff's need is a key interest to weigh when determining whether unmasking is appropriate. This is because unmasking harms a constitutionally protected right and plaintiffs seeking to unmask enjoy no countervailing constitutional right to automatically learn speakers' identities upon establishing their liability.[6]

[6] *Amicus* explains below in Section IV why the First Amendment's presumption of access to court proceedings does not automatically require identifying anonymous parties once liability is found.

B. The Supreme Court and This Court Have Required Similar Balancing Under the Qualified First Amendment Discovery Privilege.

The qualified First Amendment discovery privilege recognized by this Court and others requires a balancing test similar to the anonymous online speech cases described above. Although the analysis differs from the test for unmasking anonymous online speakers, the privilege is similar in that discovering parties must show they *need* access to private associational information. Also like the test for unmasking anonymous online speakers, the qualified discovery privilege ensures that parties do not abuse discovery and improperly unmask private expressive associations without first demonstrating that they have justified intruding on First Amendment rights.

In *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), the Supreme Court held that requiring the NAACP to disclose its membership lists in response to discovery requests would have violated its members' First Amendment free association rights. *Id*. at 465-6. This violation was particularly troublesome because there is a "vital relationship between freedom to associate and privacy in one's associations." *Id*. at 462. Although the Court recognized that the right to freely associate was not absolute, the state of Alabama needed a "controlling justification" before obtaining NAACP membership lists via subpoena. *Id*. at 466.

The Supreme Court later recognized in *Talley*, 362 U.S. at 65, that the same

First Amendment concerns at issue in *NAACP* in discovering the identities and associations of individuals were present in a law that prohibited anonymous speakers from distributing pamphlets in Los Angeles. Specifically, "fear of reprisal might deter perfectly peaceful discussions on matters of public importance." *Id*. Thus, the privilege extends to protect both the First Amendment right of association and speech.

This Court has recognized the qualified First Amendment discovery privilege. In *NLRB v. Midland Daily News*, 151 F.3d 472, 475 (6th Cir. 1998), this Court quashed an NLRB subpoena that sought to identify an anonymous party that paid for a newspaper advertisement, because disclosure would have impermissibly burdened the First Amendment speech rights of both the newspaper and the anonymous advertiser. *Id*. This Court applied a balancing test and held that, given the First Amendment right of anonymous commercial speech, the NLRB "failed to demonstrate a substantial state interest which outweighs the danger to the free speech rights of Midland, its anonymous advertiser, and the countless similarly situated entities across the nation." *Id*.

Other federal appellate courts have adopted and apply the qualified First Amendment discovery privilege. *See FEC v. Larouche Campaign*, 817 F.2d 233, 234-35 (2d Cir. 1989); *Perry v. Schwarzenegger*, 591 F.3d 1126, 1139-41 (9th Cir. 2009); *In re First National Bank, Englewood, Colo.*, 701 F.2d 115, 118-19 (10th

Cir. 1983); *see also Snedigar v. Hoddersen*, 786 P.2d 781, 783 (Wash. Sup. Ct. 1990) (holding that the discovering party "must establish the relevancy and materiality of the information sought, and show that there are no reasonable alternative sources of information.").

C. Courts Balance The Harm to Parties and Consider the Public Interest When Determining Whether to Grant Injunctions.

Another example of courts analyzing competing concerns that implicate First Amendment rights is the traditional balancing they employ when considering whether to grant an injunction.

The test first requires plaintiffs to prevail on the merits and demonstrate that they have suffered an irreparable injury that cannot be remedied at law. *eBay Inc. v. MercExchange*, 547 U.S. 388, 391 (2006); *Barry v. Lyon*, 834 F.3d 706, 720-21 (6th Cir. 2016). Even after plaintiffs make such a showing, courts must still balance the hardships between the parties and consider whether the injunction would harm the public interest. *eBay*, 547 U.S. at 391.

In the context of an injunction seeking to unmask an anonymous speaker, the balancing of hardships would include the concrete harms to the speaker described above in Section I.C. This Court has recognized that in weighing an injunction request, the loss of First Amendment rights constitutes an irreparable injury that must be balanced against the other parties' claimed interests. *See United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Regional Transit*

Authority, 163 F.3d 341, 363 (6th Cir. 1998) (*Local 1099*).

Moreover, when plaintiffs seek injunctions that may limit or chill future speech, there are additional, significant First Amendment concerns at stake, such as whether the injunction would constitute a prior restraint on speech. *See Kramer v. Thompson*, 947 F.2d 666, 677-79 (3d Cir. 1991) (holding that a prospective injunction barring "prospective libel" amounted to a prior restraint); *Kinney v. Barnes*, 443 S.W.3d 87, 96-98 (Texas Sup. Ct. 2014) (holding injunctions barring future speech are both prior restraints and overinclusive content-based restrictions on speech in violation of the First Amendment).

This Court has also recognized that consideration of the public interest in the injunction inquiry includes the remedy's impact "on the free flow of ideas" protected by the First Amendment. *Local 1099*, 163 F.3d at 363.

III. THROUGHOUT THIS CASE, THE TRIAL COURT PROPERLY BALANCED THE COMPETING NEEDS OF THE PLAINTIFF AGAINST DOE'S FIRST AMENDMENT RIGHT TO ANONYMITY.

In repeatedly applying the balancing test to determine whether to unmask anonymous online speakers, the trial court correctly focused its analysis on whether Plaintiff *needed* Doe's identity to prove its claims or to hold Doe liable for the infringement. In so doing, the court did not abuse its discretion. Indeed, the trial court's careful balancing at multiple stages of the case is a model for how other courts should analyze the competing interests when parties seek to unmask

anonymous speakers.

A. The Court's Order Limiting Disclosure of Doe's Identity to Plaintiff's Attorneys Carefully Balanced Plaintiff's Need to Develop Evidence Against Protecting Doe's Anonymity.

Adopting the balancing test involving requests to unmask anonymous speakers as articulated in the *Art of Living II* and *Highfields* cases, the trial court's discovery order amid summary judgment briefing properly analyzed the competing interests in whether to unmask Doe. Order on Motion to Compel Discovery, RE 48, PgID# 1429-35.

The court began its analysis by focusing on Plaintiff's purported need to identify Doe. The court recognized that Plaintiff's need for Doe's identity was limited to determining whether Doe was associated with one of Plaintiff's competitors. This disclosure was necessary, Plaintiff argued, because its requested injunctive relief required knowing Doe's identity and his associations to determine if and how he should be prevented from infringing the copyrighted work in the future. *Id*., PgID# 1436-37.

The court also recognized that unmasking would harm Doe. *Id*., PgID# 1436.

The court then balanced those interests. First, it held that "plaintiff's limited need for discovery" was conjectural and based on an unproven theory of whether Doe and other potential co-infringers would further violate Plaintiff's rights. *Id*.,

PgID# 1437. Against this limited need, the court held that Doe's anonymity should be preserved because of the possibility (at that time) that Doe might have prevailed on his infringement defenses, and because unmasking is itself a First Amendment injury. *Id*., PgID# 1437.

Rather than denying Plaintiff's request outright, the court instead crafted a narrow discovery order that allowed Plaintiff access to information that would confirm or deny its theory about Doe's identity as someone associated with a competitor without unmasking Doe. *Id*., PgID# 1436-39.

The court's attorneys-eyes-only disclosure order demonstrated that balancing the interests and determining whether to unmask anonymous speakers is more than a mere binary proposition of revealing a speaker's identity or not. Instead, the order demonstrates that the rules of civil procedure and the court's inherent discretion can accommodate the concerns of both parties. The trial court thus acted appropriately and showed why balancing competing interests is essential when parties seek to unmask anonymous speakers.

Other courts have similarly approved of discovery compromises that balance individuals' anonymity rights against the parties' purported need for discovery. For example, the Fourth Circuit endorsed a similar attorneys-eyes-only disclosure in a securities fraud case in which a nonparty deponent asserted a First Amendment right to anonymity. *Lefkoe v. Jos. A. Bank Clothiers, Inc.*, 577 F.3d 240 (4th Cir.

2009). And the *Art of Living II* court held that alternatives to identification via an in-person deposition include permitting depositions by telephone or via written questions. 2011 WL 5444622 at *10, n. 7.

B. After Finding that Doe Infringed Plaintiff's Copyright, the Court Twice Balanced the Interests and Determined that Plaintiff Was Not Entitled to Unmask Doe.

After the trial court denied Doe's summary judgment motion and found that posting the copyrighted work infringed Plaintiff's copyright, it twice more balanced the interests—focusing again on Plaintiff's need for Doe's identity—and concluded that Doe's identity should not be revealed.

In the first instance, the court once more recognized Doe's strong First Amendment interests in maintaining his anonymity. Order Denying Summary Judgment, RE 56, PgID# 1705. It also observed that while Plaintiff earlier needed its counsel to learn Doe's identity to explore Plaintiff's theory that Doe had ties to Plaintiff's competitors, that need was no longer present. *Id*., PgID# 1705. The court next explained: "Further unmasking of the defendant has not been shown to be necessary in light of defendant's sworn testimony that he will not engage in future infringement" of the work. *Id*., PgID# 1706. Moreover, the court was satisfied that Doe could maintain his anonymity while still confirming to Plaintiff and the court that he had destroyed all copies of the work in his possession. *Id*., PgID# 1705-06. In sum, the court thus found that Doe's interest in maintaining his anonymity

outweighed Plaintiff's interest in unmasking Doe, because Plaintiff had obtained complete relief without having to unmask Doe.

The court later performed a second post-liability balancing test and determined once more that unmasking Doe was not necessary to grant Plaintiff the relief it sought. In supplemental briefing, Plaintiff one more asserted that Doe needed to be unmasked to vindicate its rights and ensure that he did not infringe the copyrighted work in the future. Order Denying Motion for Reconsideration, RE 63, PgID# 1824.

In declining to unmask Doe, the court recognized that Plaintiff had already vindicated its rights by obtaining a summary judgment ruling in its favor, along with obtaining the relief it sought because Doe had destroyed all copies he had possessed. *Id*., PgID# 1824. The court then found that Plaintiff had provided no new justification "to explain why it would be *necessary* to unmask Doe" to ensure compliance with a destruction order. *Id*., PgID# 1824 (emphasis added).

The court thus found that there was no *new* necessity articulated by Plaintiff that would alter its earlier conclusion that Doe did not need to be unmasked to comply with the court's judgment and its accompanying relief. *Id.*, PgID# 1824-25. The court's conclusion was not an abuse of discretion. Moreover, the balancing test preceding its conclusion was required by the First Amendment.

IV. THE FIRST AMENDMENT'S PRESUMPTION OF ACCESS TO JUDICIAL RECORDS AND PROCEEDINGS DOES NOT AUTOMATICALLY REQUIRE UNMASKING DOE.

Plaintiff argues that unmasking is required by the First Amendment right of access to judicial records and proceedings. Appellant's Opening Brief (AOB) 14-18. It goes further, arguing that "[o]ur system of justice does not permit an adjudicated copyright infringer to remain anonymous." *Id*. at 14. But Plaintiff has no automatic right to unmask Doe, as the presumption of access can be rebutted based on a showing that identification would injure the speaker's First Amendment right to anonymity.[7]

EFF strongly supports the First Amendment right of access to judicial records and proceedings and has intervened in cases to assert it on behalf of the public.[8] Yet even as an advocate for this right, *amicus* acknowledges that it can sometimes yield to competing interests, including the First Amendment right to

[7] Plaintiff also errs when it claims that "[t]he District Court conclusively negated the 'First Amendment' basis for anonymity when it rejected Doe's fair use defenses." AOB 18. Fair use is one of the Copyright Act's "built-in First Amendment accommodations." *Eldred v. Ashcroft*, 537 U.S. 186, 190 (2003). It safeguards a speaker's First Amendment interests with respect to the *content* of their speech—specifically, their use of words authored by another. Fair use does not, by itself, protect a speaker's right to anonymity, a separate First Amendment interest. Denial of a fair use defense is not sufficient to terminate a defendant's other First Amendment rights, including anonymous speech.

[8] For example, EFF intervened in a patent case in which almost all the filings were completely sealed to learn basic details about the claims and arguments made by the parties. *See Blue Spike v. Audible Magic*, No. 15-cv-584 (E.D. Tex. May 17, 2016), https://www.eff.org/cases/blue-spike-v-audible-magic.

anonymity.

The Supreme Court has recognized that although there is a general right to access judicial records and proceedings, it is not absolute. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-98 (1978). This Court has similarly held that there are "important exceptions which limit the public's right of access to judicial records." *In re Knoxville News-Sentinel Co., Inc.*, 723 F.2d 470, 474 (6th Cir. 1983). This Court's test asks whether a party seeking to limit access has rebutted the presumption by showing a specific, identifiable harm and that the access restrictions be narrowly tailored to protect that interest. *Id*. at 477.

The presumption is rebutted here. First, as described above, anonymous speakers' loss of their First Amendment rights is a specific, identifiable harm that can rebut the presumptive right of access to judicial records and proceedings.

Second, an anonymous speaker's identity is also protected by the qualified First Amendment discovery privilege. This Court has held that evidentiary privileges are one interest that can overcome the right of access to judicial records and proceedings. *Shane Group, Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299, 308 (6th Cir. 2016).

Third, this Court has also recognized that, when laws and regulations require confidentiality of information, they create a strong privacy interests that can rebut the presumption of access. *See Knoxville News-Sentinel*, 723 F.2d at 477. The right

to anonymous speech should be categorized as confidential private information protected by the First Amendment, like other laws that protect private facts. *Id*.

Moreover, keeping the speakers' identity secret by redacting identifying information in otherwise public records and proceedings is a narrowly tailored remedy that affords access to the extent reasonably possible while also protecting speakers' constitutional rights. *Knoxville News-Sentinel*, 723 F.2d at 477.

Plaintiff is thus incorrect to assert that its First Amendment right of access to the courts automatically entitles it to learn Doe's identity, because that right must be applied consistently with Doe's separate First Amendment right of anonymous Internet speech.

CONCLUSION

For the foregoing reasons, this Court should affirm the court's decisions below and hold that the First Amendment requires trial courts to balance competing interests before unmasking anonymous speakers throughout all phases of litigation.

Dated: January 17, 2017

By: /s/ Aaron Mackey
Aaron Mackey
Sophia Cope
Adam Schwartz
Andrew Crocker
Mitch Stoltz
Daniel Nazer
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
Telephone: (415) 436-9333
amackey@eff.org

Counsel for Amicus Curiae Electronic Frontier Foundation

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the foregoing brief of *Amicus Curiae* complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief is printed in proportionally spaced 14-point Times New Roman font, using Microsoft Word for Mac 2011 and there are [5,531] words in the brief according to the word count of the word-processing system used to prepare the brief (excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)). The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and with the type style requirements of Fed. R. App. P. 32(a)(6).

I hereby certify that on January 17, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

Dated: January 17, 2017

By: /s/ Aaron Mackey
Aaron Mackey

Counsel for Amicus Curiae
Electronic Frontier Foundation