13-2784-cv

United States Court of Appeals
for the
Second Circuit

CHEVRON CORPORATION,
Plaintiff-Appellee

– v. –

NON-PARTIES JOHN DOE/SIMEONTEGEL@HOTMAIL.COM, JOHN DOE/MEY_1802@HOTMAIL.COM, JOHN DOE/PIRANCHA@HOTMAIL.COM, JOHN DOE/DURUTI@HOTMAIL.COM
Movants-Appellants

– v. –

STEVEN DONZIGER, THE LAW OFFICES OF STEVEN R. DONZIGER, DONZIGER & ASSOCIATES, PLLC, JAVIER PIAGUEAJE, HUGO GERARDO, CAMACHO NARANJO, al.,
Defendants,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK
The Honorable Lewis A. Kaplan, United States District Judge

BRIEF FOR AMICI CURIAE HUMAN RIGHTS WATCH , DOE/SKYWALKER, DOE/KLIM, AND DOE/STOPTHOMSONSAFARIS, AUTOMATTIC INC., , ETHAN ZUCKERMAN and REBECCA MacKINNON IN SUPPORT OF NON-PARTY JOHN DOE MOVANTS APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29, *Amici* state as follows:

Human Rights Watch is a nonprofit corporation and does not issue stock**;**

Automattic Inc. has no parent corporations, and no publicly held corporation owns 10% or more of its stock.

Doe/Skywalker, Doe/Klim and Doe/StopThomsonSafaris are private individuals.

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All parties have consented to the filing of this brief.

Interest of the Amici Curiae[1]

The *Amici* all share an interest in ensuring robust debate on international issues. They believe that the rulings of the District Court will inhibit the exchange of information and ideas between Americans and foreigners.

Human Rights Watch is one of the world's leading independent organizations dedicated to defending and protecting human rights. It believes that the internet and social media are transforming political activism in repressive countries and spawning more diffuse and dynamic political movements, but that these developments may be stymied without proper legal and/or technological protections, particularly for those under repressive regimes.

Does Skywalker and Klim are the pseudonyms of two bloggers, neither citizens nor residents of the United States, who created blogs discussing the Art of Living Foundation, an international organization based in India, which they characterize as an abusive cult. The U.S. branch of the organization brought a lawsuit alleging defamation, trade libel, trade secret misappropriation and copyright infringement. The defamatory statements at issue included those not

[1] No person other than amici or their counsel authored this brief, or contributed money to fund the preparation or submission of this brief.

only of Klim and Skywalker but also those of anonymous persons who had posted comments to the blog. Klim and Skywalker appeared to defend their own anonymity and that of the commenters, and the District Court declined to require the disclosures of their identities, in a ruling that is discussed below.

StopThomsonSafaris.com is a blog created by an anonymous person who is neither a U.S. citizen nor resident, concerning an ongoing dispute and litigation in Tanzania between local Maasai residents and an American safari company that runs safaris on the disputed land. The safari company has brought a defamation lawsuit, pending in the Superior Court in San Francisco, and is seeking to learn the identity of the blogger.

Automattic Inc. is a distributed company with work space in San Francisco, California. Automattic operates WordPress.com, a web publishing platform for blogs and websites that is powered by the open source WordPress software. There are more than 33 million WordPress.com blogs, and the WordPress.com network of sites receives about 14 billion page views each month. Automattic has resisted discovery seeking information regarding the identity of its customers when it believed that the customer has not been given adequate notice and opportunity to move to quash such a subpoena.

Ethan Zuckerman is director of MIT's Center for Civic Media and co-founder (with Ms. McKinnon) of Global Voices, an online community dedicated to

intercultural communication and freedom of speech. He works closely with journalists, activists and whistleblowers outside the US who depend on digital communication systems in the US.

Rebecca MacKinnon is a Senior Research Fellow at the New America Foundation, a non-partisan policy institute, where she leads the Ranking Digital Rights project. She has worked with, conducted research on, and written about the risks to free expression and privacy faced by human rights defenders, whistleblowers, and investigative journalists when using U.S.-based digital platforms.

Summary of Argument

1. The District Court ruled that, because the Does made no preliminary showing that they had "strong connections" to the United States, the First Amendment right to anonymous speech was not implicated. The District Court erred, and its ruling, if allowed to stand, will impede the free exchange of ideas between Americans and foreigners. This Court should be mindful of the far more typical situation in which the right to anonymity arises -- when a weak, even frivolous, defamation case is filed against an anonymous internet speaker, often for the sole purpose of learning the identity of the speaker.

This Court has adopted a three-part test for determining application of various constitutional protections in situations with "extraterritorial dimensions"

Lamont v. Woods, 948 F.2d 825, 834 (2nd Cir. 1991). Applying that test to the First Amendment rights, there is no basis for treating foreigners any differently than Americans when determining whether to strip them of their anonymity. Just as this Court reasoned with respect to the Establishment Clause bar on endorsement of religion, *Lamont, supra*, neither the history of the Free Speech clause, its operation or text, nor practical concerns support the District Court's limitation on protecting anonymous speech and association.

In any event, any speaker who chooses to use an American platform to communicate has subjected her anonymity to challenge within the American courts. That is in itself sufficient "voluntary connection" to implicate the First Amendment, and no further showing of "strong connections" to the United States need be shown.

2. Foreign anonymous speakers have standing to assert First Amendment rights. They themselves would suffer injury-in-fact if stripped of their anonymity. Under relaxed First Amendment standing principles, they also have standing to assert the rights of those Americans who would wish to hear from them. The District Court held, however, that they had no such standing, and also that they had no standing to assert the rights of Does who had failed to move to quash the subpoena. The District Court reasoned that there was no reason to believe the absent Does faced any obstacles in moving to quash the subpoena.

On the contrary, there is always reason to believe that an absent anonymous speaker faced significant obstacles in seeking to protect her anonymity. The first obstacle is she may have no notice of the subpoena. If she has notice, it takes a fair amount of legal sophistication to even understand the concept of appearing anonymously to challenge the subpoena. Practically speaking, the speaker must find an attorney conversant in this area of the law, who in a matter of weeks (at most) can analyze the case and prepare what amounts to a summary judgment motion. Many people, and certainly most foreigners living abroad, are unlikely to have the wherewithal to accomplish this in a timely fashion. Courts should therefore liberally grant standing to third parties to defend the rights of absent Does.

ARGUMENT

II. When Discovery Processes of American Courts Are Invoked to Strip a Speaker of Her Anonymity, She Is Entitled to Invoke First Amendment Protections Without Having to Demonstrate "Strong Connections" to the United States

A. When a Party Seeks to Use Discovery to Strip a Speaker of her Anonymity, Courts have Balanced the Plaintiff's Need for Discovery Against First Amendment Rights

To understand the potentially enormous implications of the District Court's ruling, it is essential to understand the typical case in which the First Amendment right to anonymity arises. The issue arises when a party files a "Doe" lawsuit against an anonymous speaker on the internet – typically for defamation. A

subpoena will be issued to the speaker's internet service provider (ISP) or other party hosting the speech. The comment may be on a consumer site (such as Yelp!), or on the comment section of a newspaper site.

As one court has noted,

> there is reason to believe that many defamation plaintiffs bring suit merely to unmask the identities of anonymous critics. As one commentator has noted, "the sudden surge in John Doe suits stems from the fact that many defamation actions are not really about money." "The goals of this new breed of libel action are largely symbolic, the primary goal being to silence John Doe and others like him."

Doe v. Cahill, 884 A.2d 451, 457 (Del. 2005) (citation omitted). The Court recognized that

> This "sue first, ask questions later" approach, coupled with a standard only minimally protective of the anonymity of defendants, will discourage debate on important issues of public concern as more and more anonymous posters censor their online statements in response to the likelihood of being unmasked.

Id.

In the case of a foreigner living abroad, the disclosure of her identity may expose her to the risk that she will be pursued -- by litigation or extrajudically -- in a jurisdiction that may have no protections for freedom of expression, or even the rule of law.

But the chilling of debate can only be avoided if someone shows up in Court to contest the subpoena. Whether such a motion to quash is filed depends on

whether the ISP or other Web host has voluntarily (or per court order) given notice to the speaker that his identity is being sought. If not, the speaker is likely to be stripped of her anonymity without ever having an opportunity to protect that right.

Recognizing that this poses a due process problem, a number of courts have held that the plaintiff should make some good faith effort to notify the speaker of the lawsuit and subpoena and give them an opportunity to move to quash. *See Dendrite v. Doe*, 775 A.2d 756, 760-61 (N.J. 2001), *accord Cahill*, 884 A.2d at 460-461.

The problem is that the host may only possess information that can be used to ultimately ***identify*** the speaker (perhaps after further investigation), but which does not give the ISP any practical immediate means to give actual notice. For example, the ISP may only possess an email address that the user ceased to use many years ago, and IP addresses, which may be used by plaintiff to identify the user but cannot be used to communicate with her. Recognizing this difficulty, the Court in *Cahill* required that the plaintiff post notice of the lawsuit/subpoena on the message board on which the allegedly defamatory statements had been made. *Id*, 884 A.2d at 460-61.

Assuming the speaker does in fact receive actual notice, it is often very difficult for the speaker to find counsel willing and able to put together a motion to quash in the limited window opened by the ISP or court order. Given the existing

state of the law of anonymity, to effectively quash the subpoena, the anonymous speaker must find a lawyer who is willing and able to analyze the speech and underlying factual issues in the case and assemble what often amounts to a summary judgment motion, in a matter of a few weeks at most.

Courts have generally required some balancing of the plaintiff's (purported) need for discovery of the Doe's identity against the Doe's First Amendment right to anonymity. Where the cause of action is defamation or some similar reputational tort, most jurisdictions have chosen to follow either *Dendrite* or *Cahill*. Both cases required the plaintiff to (1) show that it had taken reasonable steps to give notice to the anonymous defendants, (2) show that the allegedly actionable statements be set forth with particularity, (3) establish that the complaint states a claim and (4) present *prima facie* evidence sufficient to support the claim. *Dendrite*, 775 A.2d at 760-761; *Cahill*, 884 A.2d at 459-61.

The major difference between the two leading cases is that *Dendrite* also (5) stated a further balancing test: "the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed." *Dendrite*, 775 A.2d at 760-761. In the *Cahill* decision, the Court rejected this last "balancing test," reasoning that such balancing is already subsumed in the "summary judgment" standard set out in

the first four prongs of the test. *Id.*,884 A.2d at 461. In *Mobilisa Inc. v. Doe*, the Court presented a thoughtful analysis as to why *Dendrite's* "balancing" test was needed. *Id.* 217 Ariz. 107, 111 (Ariz. Ct. App. 2007). Without such a final balancing test, the Court is unable to consider other relevant factors bearing on the plaintiff's purported need to discover the identity of the Doe, for example where the Doe was simply a cumulative witness rather than a defendant. *Id.*

Another typical situation in which the right to anonymity is asserted is in cases involving the downloading of music or other copyrighted works. In the leading case, the court purportedly synthesized the preceding case law – including *Dendrite* -- into an omnibus balancing test:

> Cases evaluating subpoenas seeking identifying information from ISPs regarding subscribers who are parties to litigation have considered a variety of factors to weigh the need for disclosure against First Amendment interests. These factors include: [i] a concrete showing of a prima facie claim of actionable harm … [ii] specificity of the discovery request, … [iii] the absence of alternative means to obtain the subpoenaed information, … [iv] a central need for the subpoenaed information to advance the claim, …and [v] the party's expectation of privacy.

Sony Music Entm't Inc. v. Does, 326 F.Supp. 2d 556, 564-565 (S.D.N.Y. 2004)(citations omitted). The court held that there was some minimal Amendment minimal value in the expressive act of downloading and sharing one's favorite music. *Id.*, at 564. But the court deemed the First Amendment interest to be of so little weight that, under the circumstances, it was trumped by the need of the music

companies to learn the identities of the downloaders in order to serve them with the infringement lawsuits. *Id.* at 566.

In *Arista Records, LLC v Doe,* another case involving downloading of copyrighted music, this Court approved the *Sony Music* test. *Id.* 605 F.3d 110, 118-19 (2d Cir 2010). This Court suggested that the test might apply in non-copyright cases, but the question was not presented either by the facts of the case or by the posture (in which the *Sony Music* test was not challenged). *Id.*

Other courts have ruled that which test applies depends on the "nature of the speech" – that is to say whether it involves core First Amendment expression such as political, literary or religious speech. *In re Anonymous Online Speakers*, 661 F.3d 1168, 1176-77 (9th Cir. 2011).

In the case in which *Amici* Klim and Skywalker were defendants, the court applied the *Dendrite* test, following *Anonymous Online Speakers* in ruling that what was significant was not the cause of action (copyright) but the "nature of the speech," namely that it concerned an issue of public interest. *Art of Living Foundation v. Does*, 2011 U.S. Dist. Lexis 129836,* 15-17 (N.D. Cal. Nov. 9, 2011) (citing test of *Highfields Capital Mgmt v. Does*, 385 F.Supp.2d 969, 972, 980 (N.D.Cal. 2004, 2005). The court in *Art of Living* distinguished *Sony Music* on the ground that in *Sony Music* the alleged infringement (music downloading) had little expressive value, whereas the alleged infringement in *Art of Living*

involved commentary on an issue of public importance. *Art of Living*, 2011 U.S. Dist. LEXIS 129836, * 15-16, 20-21.

But *Sony Music/Arista* and *Art of Living/Anonymous Online Speakers* can easily be reconciled. The *Sony Music* test is a multifactor test that should be read as incorporating *Dendrite's* balancing of interests. It should be read as incorporating a "nature of the speech" test, in that speech with low First Amendment value (downloading music) carries little weight, but core First Amendment speech carries much more weight in the balancing of interests.

By the same token, "the central need for the subpoenaed information to advance the claim" of the *Sony Music* test takes into account the specific posture of the discovery request. For example, *Sony Music*, as in many anonymity cases, the discovery question had arisen pre-service, and thus arguably the plaintiff had a pressing need to discover the identity of the defendant in order to prosecute the action. *Id*., 326 F.Supp.2d at 566. By contrast, in *Art of Living*, the defendant had appeared through counsel, so discovery of the defendant's identity was not necessary to pursue the case, at least at an initial stage of the proceedings. *Id.** 29. The same result should have been reached on those facts under the *Sony Music* test.

Similarly , the "central need for the subpoenaed" information will usually be less where the Doe is a witness rather than a defendant. Certainly this is true when the witnesses potential testimony is cumulative. The *Sony Music* test takes this

into account, requiring the Court to consider whether "alternative means" of obtaining the information. Thus *Sony Music* is also consistent with *Doe v. 2theMart.com*,140 F.Supp.2d 1088 (W.D. Wash. 2001) upon which Appellants rely. *Accord Mobilisa,* 217 Ariz. at 111 (assimilating *2theMart* into *Dendrite* balancing test).

B. The District Court Erred In Requiring A Preliminary Showing to Be Made that the Anonymous Speakers are U.S. Citizens or have Strong Connections to this County

Here, the District Court declined to apply *any* of the various First Amendment balancing tests urged by the parties or movants, including the *Arista/Sony Music* test. JA0033. Instead, the Court ruled that it need not consider the First Amendment in the balance ***at all***, on the grounds that the movants and absent Does had "submitted no evidence that they are U.S. citizens or otherwise have a strong connection in this country." JA240. In setting that preliminary requirement, and in determining that the Does had not met it, the District Court erred. (The *Amici* express no opinion as to whether the First Amendment interests of the Does in this case are outweighed by the need of plaintiff for discovery.)

The District Court reasoned that the Does had failed to establish that they are "people to whom these things are secured by our Constitution." JA243. The Court relied on the Supreme Court's ruling concerning the extraterritorial application of the Fourth Amendment in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265

(1990), and on the statement in *Lamont*, that this Court could "think of no theory under which aliens would have standing to challenge either a grant [of government aid] or a denial of aid [under the Establishment Clause of the First Amendment]." JA243& n. 13 (quoting *Lamont*, 948 F.2d at 839). None of the precedents relied upon by the District Court support the imposition of preliminary showing that an anonymous speaker has "strong connections" to this country.

1. The Fourth Amendment Analysis in Verdugo *Does Not Support The District Court's Limitation on the First Amendment Rights of Anonymous Speech and Association*

The District Court's use of the phrase "people to whom these things are secured by our Constitution," suggests a one-size-fits-all determination as to the class of people who are deemed to be able to invoke the Constitution's protection. But as this Court ruled in *Lamont*, the question whether a particular clause of the Constitution applies "to governmental activities having extraterritorial dimensions," is analyzed on a case-by-case basis, according to the three-part framework set out by the Supreme Court in *Verdugo*:

> (1) the operation and text of the constitutional provision; (2) history; and (3) the likely consequences if the provision is construed to restrict the government's extraterritorial activities.

Lamont, 948 F.2d at 834.[2] Applying that test, the District Court's limitation of rights to speak and associate anonymously cannot stand.

a) The History of the Free Speech Clause Does Not Support the District Court's Limitation

This Court, applying the *Verdugo* analysis, found nothing in the history of the Establishment Clause to suggest that it was limited to government endorsements of ***domestic*** religious entitities. While noting that there is always some speculative element in ascribing views to the Founders, the Court nevertheless thought it likely that "Madison, Jefferson, or any of the supporters of the Establishment Clause would have abhorred -- as much as a tax for the support of Christian teachers -- the use of federal tax money for the support of foreign sectarian schools" *Lamont*, 948 F.2d at 837. Moreover, the Court suggested that since "[m]any of the colonists had fled Europe precisely because of religious oppression," it is difficult to image that "Pennsylvania Quakers, Massachusetts Puritans, Maryland Catholics, or Southern Baptists willingly have paid taxes to support the Church of England, by which they felt oppressed," or that "Virginia Anglicans or Sephardic Jews willingly have supported Catholic churches in France or Spain." *Id.*, n.14.

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[2] The statement in *Lamont* – relied upon by the District Court -- that this Court could imagine no situation in which aliens would have standing -- thus must be understood as specifically applying only to the circumstances of that case, in which the standing at issue arose from the plaintiffs' status as *federal taxpayers*. *Id.*, 984 F.2d at 829.

The same reasoning applies to the Free Speech Clause, and to its protection of anonymous speech. The Founders adopted the Free Speech and Free Press Clauses in the context of a history of pre-revolutionary resistance to the English Crown via anonymous pamphleteering, both in the colonies and in England itself. *Talley v. California*, 362 U.S. 60, 64-65 (1960) (citing "[t]he old seditious libel cases in England," and pre-revolutionary anonymous "colonial patriots"); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 361 (1995) (Thomas, J. concurring)(citing pre-Revolutionary trial of John Peter Zenger). The Founders are unlikely to have believed that such freedoms extended solely to American pamphleteers and not to, say, pamphleteers based in England who continued to agitate for reform.

To be sure, the Founders were not dealing with modern technology, in which "millions of people … communicate with one another and …access vast amounts of information from around the world," via the internet, "a medium of worldwide human communication." *Reno v. ACLU*, 521 U.S. 844, 850 (1997). Nevertheless, they understood that published discourse in their own time took place on a worldwide stage. Significantly, they characterized their own litany of grievances against the Crown in the Declaration of Independence as "facts" presented to a "candid world" in order to influence the "opinions of mankind." *Id.*, Preamble.

In any event, as this Court has noted, the analysis of the "history" of the relevant constitutional clause must consider not only the beliefs of the Founders but also the values of the clause under "modern" jurisprudence. *Lamont*, 948 F.2d at 839-840.

The modern understanding of the Free Speech Clause is that "debate on public issues should be "uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Americans must have access to an uninhibited "flow of ideas," not only from their fellow citizens, but also from around the world. *See, e.g., Lamont v. Postmaster General*, 381 U.S. 301, 306-307 (1965)("communist political propaganda" from China); *Kleindienst v. Mandel*, 408 U.S. 753, 762-763 (1972)(discussions with foreign Marxist scholar).

In *Bd. of Educ. v. Pico*, the Supreme Court noted that its "precedents have focused 'not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas." *Id.*, 457 U.S. 853, 866 (1982).

> [T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. … The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.

Id. at 866-67 (citations omitted).

The right to speak anonymously thus protects "unpopular individuals from retaliation … at the hand of an intolerant society," *McIntyre*, 514 US.at 357, not simply to protect ***the individual*** for her own sake, but also to protect public discourse from being denied the contribution of these unpopular views.

In the *Art of Living* case, the court protected the identity of a foreign blogger (*Amicus* Skywalker), not only because it was "self evident" that disclosure of his identity would chill his own speech, but also because stripping Skywalker of his anonymity would deter "other critics from exercising their First Amendment rights." *Id.* at * 20-21, 26-28 (citing *McIntyre, supra, Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010) *Highfields Capital,* 385 F.Supp.2d at 980-81).

In the modern world, interconnected by the internet, an anonymous Syrian may upload to Youtube video evidence of a humanitarian atrocity. *See* Liam Stack, Video Shows Victims of Suspected Syrian Chemical Attack, New York Times, August 21, 2013, http://thelede.blogs.nytimes.com/2013/08/21/video-and-images-of-victims-of-suspected-syrian-chemical-attack.[3] Such a posting is as

[3] *See also* Gough, Neil, *Chinese Democracy Advocate Is Freed After 8 Years in Prison*, New York Times, September 7, 2013 (activist jailed after Yahoo reveals identity to Chinese government) (http://www.nytimes.com/2013/09/08/world/asia/shi-tao-chinese-democracy-advocate-is-released-from-prison.html?_r=1&); (same); Lara, Tania, JOURNALISM IN THE AMERICAS Blog, April 8, 2013 *Citizen journalist threatened for reporting on violence inMexico announces closing of Facebook, Twitter accounts* (https://knightcenter.utexas.edu/blog/00-13460-creator-valor-por-tamaulipas-announces-closing-accounts) (Mexican drug cartels seek identity of

much a contribution to the robust debate about appropriate responses to the Syrian conflict as the debate on the floor of the Senate. There is nothing in either the founding or modern history of the Free Speech Clause that suggests that it protects this contribution any less because the Syrian has no stronger connection to this country than a desire to influence the "opinions of mankind" by setting forth such "facts" before a "candid world."

b) The "Operation and Text" of the Free Speech Clause Do Not Support the District Court's Limitation

This Court, in analyzing the "operation" of the Establishment Clause, distinguished *Verdugo* on the grounds that the violation of the Fourth Amendment was fully accomplished ***in Mexico*** at the time of the "unreasonable governmental intrusion." *Lamont*, 948 F.2d at 834. By contrast, the alleged Establishment Clause violation at issue occurs in the United States, "at the time that appellants

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citizen journalist); Global Voices Advocacy, *Mexico: Another Voice Goes Silent [Update]*, April 19, 2013 (http://advocacy.globalvoicesonline.org/2013/04/19/mexico-another-voice-goes-silent/) (same); Roth, Kenneth, Human Rights Watch, *New Laws Needed to Protect Social Media: Regimes are using social media to curb freedoms, just as it is being used to promote it*, April 15, 2011 (http://www.hrw.org/news/2011/04/15/new-laws-needed-protect-social-media) (discussing impact of social media on repressive regimes): Neiman Reports, *The Revolutionary Force of Facebook and Twitter* (http://www.nieman.harvard.edu/reports/article/102681/The-Revolutionary-Force-of-Facebook-and-Twitter.aspx) (discussing social media impact on "Arab Spring").

granted money to United States entities for the benefit of foreign sectarian institutions." *Id.*

The same is true here. The alleged violation of the right to anonymity takes place when the discovery powers delegated to litigants by an American court and directed to an entity within that court's jurisdiction are used to strip a speaker of her anonymity.

Applying the *Verdugo* analysis, this Court also examined the text of the Establishment Clause, and noted that a plurality of the Supreme Court in *Verdugo* found it significant that the Fourth Amendment guarantees "the right of ***the people*** to be secure . . . against unreasonable searches and seizures." *Lamont,* 948 F.2d at 835. To this plurality, the phrase "the people" signified that the amendment was to apply only to "persons who were part of or substantially connected to the national community" and would not include a "resident of Mexico with no voluntary connection to the United States." *Id.* By contrast, this Court reasoned, the "Establishment Clause, unlike the Fourth Amendment, contains no limiting language" to "the people". *Id.*

This Court's reasoning applies with equal force to the Free Speech Clause. The District Court's reasoning to the contrary, that "[t]he First Amendment provides, in relevant part, that "Congress shall make no law … abridging the freedom of speech, or … the right of the people to peaceably assemble," is

ungrammatical and unpersuasive. JA242. The First Amendment reads, in full: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." "[T]he people" is not a modification to "the freedom of speech, or of the press," any more than in the Establishment Clause.

c) There Are No "Significant and Deleterious Consequences" to Respecting the Anonymity of Foreign Speakers

Applying the *Vergugo* framework, this Court next considered whether applying the Establishment Clause bar on funding to foreign entities would have "significant and deleterious consequences for the United States" were the respondent to prevail." *Lamont*, 948 F.2d at 840.

One of the potential unwelcome consequences identified by the *Verdugo* court was that the Government's ability to employ the armed forces abroad might be affected, "significantly disrupt[ing] the ability of the political branches to respond to foreign situations involving our national interest." Assuming this factor might be stretched to involve foreign policy concerns, it is not apparent that the United States has any substantial foreign policy interest in suppressing speech to accommodate its foreign allies. A District of Columbia ordinance, designed to

comply with American treaty obligations, banning the display of signs which criticized a foreign government within 500 feet of a foreign embassy violated the First Amendment. *Boos v. Barry*, 485 U.S. 312 (1988).

Similarly, American courts have declined to enforce libel judgments from non-U.S. courts that do not comply with First Amendment protections, departing from the ordinary comity accorded such judgments. *See, e.g., Telnikoff v. Matusevitch*, 347 Md. 561, 602 (1997). Indeed the First Amendment policy underlying these decisions has been reaffirmed by a statute that gives defendants a right to remove foreign libel judgments to federal court to ensure that the judgment comports with the First Amendment. 28 U.S.C. § 4101 *et seq.*

Indeed, giving equal respect to the anonymity rights of foreign speakers is entirely consistent with U.S. international commitments such as the International Convention on Civil and Political Rights, which in Article 17 prohibits unlawful interference with "privacy, family, home or correspondence," and in Article 19 requires respect for "the right to freedom of expression" including "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers"). *See* La Rue, Frank, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, April 17, 2013, ¶¶ 47-49 (http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session

23/A.HRC.23.40_EN.pdf) ("restrictions on anonymity [on the internet] have a chilling effect, dissuading the free expression of information and ideas.")..

Indeed, according to the State Department:

> In 2013, the State Department and USAID awarded $25 million to groups working to advance Internet freedom -- supporting counter-censorship and secure communications technology, digital safety training, and policy and research programs for people facing Internet repression. This funding is the most recent addition to our investment of over $100 million in innovative Internet freedom programs globally.
>
> We do this work every day and it is a top priority. The Internet is an endless resource of information. Respect for the freedoms of expression, peaceful assembly, and association has the ability to enhance lives in ways we can't even imagine, as long as we extend the same respect for these fundamental freedoms to the online world.

United States Department of State, *Diplomacy in Action: Internet Freedom* (http://www.state.gov/e/eb/cip/netfreedom/index.htm). Thus there is no significant foreign policy interest that supports the District Court's limitation; quite the contrary. *See Lamont*, 948 F.2d at 840.

The same is true for the other potential deleterious consequence considered by this Court, that "the courts would have to invent a whole new body of jurisprudence to establish what was 'reasonable' in the way of searches and seizures conducted abroad." *Lamont*, 948 F.2d at 840. According the same First Amendment rights to foreigners as Americans would not require the development of any new jurisprudence.

On the contrary, it is the District Court's ruling that would require the development of new jurisprudence. Should speakers be required to establish their U.S. "connections' in every case, or only when the subject matter of the speech raises the inference that the speaker may be a foreigner? What sorts of connections are "strong" enough to warrant protection of anonymity, and how shall it be proven?. Should common law defamation doctrines that have lain dormant for almost fifty years be reexamined? Are they consistent with the state constitutional protections? *See Lane v. Random House*, 985 F.Supp. 141, 149-150 (D.D.C. 1995) (defamation law is now so "inextricably linked with First Amendment concerns" that courts generally no longer consider application of common law doctrines.) For example other jurisdictions such as Canada have revised the common law of defamation. *See, e.g., WIC Radio Ltd. v. Simpson*, (Canadian Supreme Court) (2008) 2 SCR 420, at 421-22 (majority modifies "honest belief" element of fair comment privilege); *id.*at 424 (LeBel, J., concurring, reasoning that "honest belief" element should be eliminated altogether) (http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/5670/index.do).

C. *The Court's Powers to Strip a Foreign Speaker of Her Anonymity Do Not Implicate the Plenary Power of Congress to Physically Exclude Aliens*

In support of its ruling that Does must make a preliminary showing regarding their citizenship or connection to the United States, the District Court

also relied upon a reference to the "people to whom these things are secured by our Constitution" in *United States ex rel. Turner v. Williams* 194 U.S. 279, 292 (1904). JA242. That case, however, involved the deportation of an alien from the United States. As the Supreme Court explained in *Kliendienst,* the power of Congress regarding the immigration power -- the physical exclusion/deportation of aliens -- is complete and trumps other constitutional considerations. *Id.* 408 U.S. 753, 766 (1972). The judicial doctrine deferring to "plenary" Congressional immigration power is somewhat anomalous, but so deep-rooted in historical tradition that it has not been disturbed by modern constitutional developments. *Id.,* (citing *Galvan v. Press*, 347 U.S. 522 (1954)).

Kliendienst involved a challenge by Mandel, a Belgian Marxist scholar, and American scholars who had invited him to a conference, to Mandel's exclusion on ideological grounds. *Id.*, 408 U.S. at 759. The Court recognized that the American scholars had a First Amendment interest in receiving the ideas and information from Mandel. *Id.* at 764-65. Moreover, the Court rejected the Government's argument that the First Amendment interest in Mandel's physical presence was necessarily eliminated by the availability of alternative means to communicate with Mandel "because 'technological developments,' such as tapes or telephone hook-ups, readily supplant his physical presence." *Id.* But since the requested

face-to-face encounter with Mandel implicated Congressional supremacy on immigration matters, the First Amendment interests were trumped. *Id*. at 765.

Here, however, there is no basis to trump the interests held to exist in *Kliendienst.* The present case in no way implicates Congress's plenary power to exclude aliens. What is at issue is precisely the ability of foreigners and Americans to engage in robust debate through the "technological developments" of the internet and email communications. This First Amendment interest must prevail.

D. Assuming Arguendo *that Anonymous Speakrs Must Have a a "Voluntary Connection" with the United States, Such a Connection is Necessarily Established by their Use of American Platforms to Communicate Their Message*

Assuming *arguendo* that the *Verdugo* requirement of a "voluntary connection" applied to the Free Speech clause, such a "voluntary connection" to the United States is necessarily present in this and other internet anonymity cases. A court's (delegated) power to issue subpoenas to discover the identity of the speaker arises ***precisely*** because the speaker has voluntarily chosen to publish or communicate her message through a United States platform.

In this regard it is significant that the American discovery processes to which the speaker has submitted herself are uniquely American. "Lawyers outside the United States often find this liberal standard ['reasonably calculated to lead to the discovery of admissible evidence'] to be unusual and sometimes shocking."

Newman, L. and Burrows, M., *The Practice of International Litigation*, 2d Ed. (2010) at III-3.

Thus the rule proposed by the District Court, "the interests of free speech and freedom of association ***of foreign nationals acting outside the borders, jurisdiction, and control of the United States*** do not fall within the interests protected by the First Amendment," simply does not apply to the facts at hand. JA243 (emphasis added).[4]

III. *Foreign Speakers Have Standing to Seek to Protect Their Own Anonymity, and Third Parties Have Standing to Protect the Anonymity of Absent Speakers*

A. Foreign Speakers Have Standing To Seek to Protect Their Own Anonymity, Both Because They Are Injured-in-Fact and Because Stripping Them of Anonymity Chills Public Debate Generally

As explained in the preceding section, the First Amendment's protection of anonymity is aimed at fostering robust debate, and thus protects the interests of foreign speakers as well as Americans who wish to hear information and views of foreigners. When a foreign speaker is at risk of being stripped of her anonymity because of the discovery processes of an American court, she has standing to seek to quash that effort, since she herself suffers "a realistic danger of sustaining a

[4] The quote is from *DKT Memorial Fund Ltd. Agency for Int' Developement*, 887 F.2d 275, 283-85 (D.C. Cir. 1989). That decision ultimately turned on the Court's determination that the "refusal [of the government to fund] a viewpoint" does not constitute a suppression of that viewpoint, and thus there was no First Amendment interest at stake for either domestic or foreign NGOs. *Id.* at 287; *accord Ctr. for Reprod. Law v. Bush*, 304 F.3d 183, 190 (2d Cir. 2002).

direct injury." *Babbitt v. United Farm Workers*, 442 U.S. 289, 298 (1979). The First Amendment is also implicated because stripping her of anonymity will "chill" the participation of others in public discourse. Even if her own injury were not deemed to violate a ***personal*** First Amendment right, she nevertheless has standing to assert the rights (1) Americans who have the right to receive information from her, and (2) of other speakers who may be inhibited if her own anonymity is lost.

> Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both.

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 756-57 (1976) (holding that recipients have standing). Litigants are given the right to challenge state actions that threaten free speech "not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Secretary of State of Maryland* v. *J. H. Munson Co.*, 467 U.S. 947, 956-57 & n.7 (1984). For example, book***sellers*** who suffer injury-in-fact have standing to challenge a statute that infringes the First Amendment rights of book***buyers***. *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392-393 (1988).

B. *Because There Are Significant Obstacles to Defending One's Anonymity, Third Parties Should Be Liberally Granted Standing to Defend the Absent Speaker's Rights*

The District Court declined to allow the Doe-Movants to assert the rights of those Does who did not timely move to quash the subpoena, reasoning that "there is neither evidence nor reason to believe that the owners of the other twenty-seven accounts would face any practical difficulties in protecting their own interests if they were so minded." JA 243-44. But in fact there is both evidence (JA215) and reason to believe that there are such practical difficulties.

The first such difficulty is that the Does may not have any notice of the existence of the subpoena. There is no guarantee that the ISP or other web host has a current working email or other contact information with which to notify the person of the risk that his or her identity will be disclosed. The Court in *Cahill,* recognizing this difficulty, required the plaintiff to post notices of the subpoena on the message board at issue. *Id.* 884 A.2d at 460-461.

Moreover, even if one assumes that effective notice of the subpoena has been given, there is no reason to assume that an anonymous speaker has the wherewithal or financial ability to secure legal assistance in the U.S. in filing a motion to quash in the limited time allotted. *Cf. Theofel v. Farey-Jones*, 359 F 3d 1066, 1074-75 (9th Cir 2003)("Fighting a subpoena in court is not cheap, and

many may be cowed into compliance with even overbroad subpoenas, especially if they are not represented by counsel …").

Indeed, the very fact that the absent person is anonymous is a reason to give third parties standing to defend that anonymity. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459-460 (1958) (granting NAACP standing to defend the anonymity of its members because they will lose it if they assert it directly). To be sure, it is possible to defend one's anonymity by appearing through counsel pseudonymously. But it takes a fair amount of legal sophistication to understand that it is possible to do so, let alone have the wherewithal to obtain the necessary assistance to do so in a timely fashion. *Singleton v. Wulff*, 428 U.S. 106, 117-18 (1976) (physician may bring suit on behalf of women's rights to obtain abortion, because the obstacles to a woman seeking to vindicate her own right include the losing of her privacy, an obstacle that is significant even though it might be surmounted by appearing via a pseudonym). All of these issues are compounded if the speakers are foreigners living abroad.

The general rule that a party must appear to assert his own rights is relaxed when "there is some genuine obstacle to such assertion," because that party's "absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by default the right's best available proponent." *Singleton*, 428 U.S. at 116.

For this reason courts have recognized, for example, third party standing rights of newspapers to defend the anonymity of commenters on their websites. *Enterline v. Pocono Med. Ctr.*, 751 F.Supp. 2d 782, 785-786 (M.D. Pa. 2008); *McVicker v. King*, 266 F.R.D. 92 (W.D.Pa. 2010). At a minimum, third parties should be allowed standing to assert the procedural component of the anonymity analysis, and ensure that reasonable efforts have been made to give notice and an adequate opportunity to be heard to the absent Does. To assume that the failure of a particular Doe to move to quash a subpoena signifies indifference to his anonymity rights is untenable. *Singleton,* 428 U.S. at 116.

Conclusion

For the foregoing reasons, the decision of the District Court should be overruled.

November 7, 2013 Respectfully submitted,

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Certification of Compliance With FRAP 32(a)(7)(C)

Pursuant to FRAP. 32(a)(7)(C), I certify as follows:

1. This Appellants' Opening Brief complies with the type-volume limitation of FRAP. 32(a)(7)(B) because this brief contains 6964 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, in 14 point Times New Roman font.

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