



March 13, 2006

The Hon. Peter J. Biondi
New Jersey Assemblyman for District 16
1 East High Street
Somerville, NJ 08876

The Hon. Wilfredo Caraballo
Speaker Pro Tempore
371 Bloomfield Ave, 2nd Floor
Newark, NJ 07107

The Hon. Upendra J. Chivukula,
Chair, New Jersey Assembly Telecommunications and Utilities Committee
888 Easton Ave.
Somerset, NJ 08873

RE: Open Letter Urging Withdrawal of Assembly Bills A1327 and A2623

Dear Assemblymen Biondi, Caraballo and Chivukula:

The undersigned coalition of industry, public interest organizations and legal scholars (the Center for Democracy and Technology, craigslist, the Electronic Frontier Foundation, Public Citizen, the US Internet Industry Association, and Professors Lyrrisa C. Barnett Lidsky and Jennifer M. Urban)¹ are deeply concerned about A1327 and A2623, your bills designed to eliminate online anonymous speech, and respectfully urge you to withdraw your support for both bills.

We believe that free speech is a fundamental human right and that the right to speak anonymously is vital to our society. The vast web of electronic media that now connects us has heralded a new age of communications, indeed a new way to convey speech. New digital networks offer a tremendous potential to empower individuals in an ever overpowering world. As the Supreme Court has explained, “[f]rom a publisher’s standpoint, it constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers and buyers.... 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, . . . the same individual can become a pamphleteer.” *Reno v. American Civil Liberties Union*, 521 U.S. 844, 853, 870 (1997).

¹ Descriptions of the signatories are provided at the end of this letter.

We understand that Assemblyman Biondi's desire is to bring civility to the Internet,² but New Jersey courts are already handling claims of defamation online in a careful and constitutionally appropriate manner. The signers and others have worked hard to develop a set of tests for courts to use when deciding how to balance a speaker's anonymity rights with claims of defamation and those tests are working. *Dendrite International, Inc. v. Doe No. 3*, 775 A.2d 756, 771 (N.J. App.Div. 2001).

Moreover, as the great justice Learned Hand explained in *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945), the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."

While we are mindful of the serious issues that may arise when information, ideas and opinions flow free, the law needs to address such matters constructively while ensuring that fundamental freedoms are protected. Our society is enriched by the diversity of debate on the Internet, and anonymous online speech is vital to enabling this debate, even if it allows name-calling and strongly worded opinions about political figures. As the Supreme Court has noted, "it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions," *Bridges v. California*, 314 U.S. 252, 270 (1941)

Instead of protecting the fundamental freedoms that have made our country great, however, Assemblyman Biondi's proposed A1327 bill would require every Internet service provider, blog, and website that allows reader comments or provides open forums to demand user identification from every participant. Assemblymen Caraballo and Chivukula's proposed A2623 bill fares no better, because it purports to require an online service provider to disclose poster's identities and "remove any material promptly when notified by a user" – unmasking speakers and squelching speech based on a mere allegation of defamation, before any court has the opportunity to consider the competing claims and conduct a constitutional assessment of the claims. **Because both A1327 and A2623 conflict with federal law, as well as the rights guaranteed by the New Jersey and federal constitutions, we respectfully urge you to withdraw your support from these bills.**

In Section 230(c) of the Communications Decency Act of 1996 ("CDA"), codified at 47 U.S.C. § 230, Congress made clear that "interactive computer services" should not be held liable as "publishers or speakers" of content posted by third parties. Yet, Assemblyman Biondi's A1327 bill proposes to make "certain operators of interactive

² See Declan McCullagh, *Perspective: The problem of thin-skinned politicians*, CNET News, < http://news.com.com/The+problem+of+thin-skinned+politicos/2010-1028_3-6046090.html > (quoting Assemblyman Biondi's Chief of Staff Scott Ross).

computer services and Internet service providers liable to persons injured by false or defamatory messages posted on public forum websites” -- in direct conflict with Section 230. A2326’s enforcement mechanism is a little less clear, but could purport to hold an online service provider liable for the underlying statements if the provider failed to comply.

Section 230(e)(3) preempts contrary state laws: “No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” As the Fourth Circuit held, “By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.” *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998); *see also Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003) and *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003). Nor does the online service provider have any obligation to remove the allegedly offending material. *Zeran*, (holding that Section 230 barred plaintiff’s claims that AOL failed to remove content posted by third parties); *accord Barnes v. Yahoo*, 2005 WL 3005602 (D.Or. 2005) (Yahoo not liable despite alleged “failure to fulfill its promise to remove the” tortious material).

Moreover, it is well-settled that the First Amendment shelters the right to speak anonymously. *See Buckley v. Am. Constitutional Law Foundation*, 525 U.S. 182, 200 (1999) (invalidating, on First Amendment grounds, state statute requiring initiative petitioners to wear identification badges); *Talley v. California*, 362 U.S. 60, 65 (1960) (holding anonymity protected under the First Amendment because forced “identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance”); *ACLU of Georgia v. Miller*, 977 F. Supp. 1228 (N.D. Ga. 1997) (striking down a Georgia statute that would have made it a crime for Internet users to “falsely identify” themselves online). These cases celebrate the important role played by anonymous or pseudonymous writings through history, from the literary efforts of Shakespeare and Mark Twain through the explicitly political advocacy of the Federalist Papers.

As the Supreme Court has held, “Anonymity is a shield from the tyranny of the majority,” that “exemplifies the purpose” of the First Amendment: “to protect unpopular individuals from retaliation...at the hand of an intolerant society.” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995) (holding 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”). Forced identification of anonymous speakers on the Internet would create a chilling effect on the speech not only of the persons whose identity is revealed, but on many other persons as well. “The free exchange of ideas on the Internet is driven in large part by the ability of Internet users to communicate anonymously.” *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001).

Therefore, the Supreme Court instructs that courts must “be vigilant... [and] guard against undue hindrances to political conversations and the exchange of ideas.” *Buckley*, 525 U.S. at 192. Moreover, that vigilant review must take place whether the speech in question takes the form of political pamphlets or Internet postings. *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (there is “no basis for qualifying the level of First Amendment protection that should be applied to” the Internet). Neither the A1327 bill's requirement that Internet speakers identify themselves, nor A2623's requirement that ISPs identify an anonymous speaker, will withstand this vigilant review.

Beyond the rights protected by the federal Constitution, New Jersey courts have found that the “New Jersey Constitution's right of free speech is broader than the right against governmental abridgement of speech found in the First Amendment.” *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty*, 138 N.J. 326, 364, 650 A.2d 757 (1994), *cert. denied*, 516 U.S. 812 (1995); *see also Sedore v. Recorder Pub. Co.*, 716 A.2d 1196 (N.J. App.Div. 1998) (recognizing the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,” quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). What is protected by the First Amendment is even more protected by the New Jersey Constitution.

Finally, the bills are unnecessary, as they address a problem that does not exist. Under existing law – as already recognized by the New Jersey courts – plaintiffs may obtain identity information, provided that they meet constitutionally mandated standards – standards that are notably missing from either bill. “Against the backdrop of First Amendment protection for anonymous speech, courts have held that civil subpoenas seeking information regarding anonymous individuals raise First Amendment concerns”. *Sony Music Entertainment v. Does*, 326 F.Supp.2d 556, 565 (S.D.N.Y. 2004). Accordingly, “the constitutional rights of Internet users, including the First Amendment right to speak anonymously, must be carefully safeguarded.” *Doe v. 2themart.com Inc.*, 140 F. Supp. 2d at 1097. And yet, both bills suggest that user identities must be revealed without even so much as a subpoena.

In one of the key cases on online anonymity nationwide, a New Jersey court determined that strict procedural safeguards must be imposed “as a means of ensuring that plaintiffs do not use 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.” *Dendrite International, Inc. v. Doe No. 3*, 775 A.2d 756, 771 (N.J. App.Div. 2001). However, in cases where the poster violates the law, the plaintiffs seeking identity information can overcome the procedural standards and the online service provider must respond to the subpoena. In fact, there was a companion case, *Immunomedics v. Doe*, 775 A.2d 773 (N.J. App.Div. 2001), argued in the Appellate Division the same day as *Dendrite*, in which the identity of the anonymous critic was ordered released.

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For more information, we direct your attention to a website sponsored by many of the organizations sending this letter at <<http://www.cyberslapp.org>>, which provides a resource to all sides litigating cases involving the anonymity of the defendants were litigated. The site provides litigation documents from dozens of past cases. Reviewing those cases shows how varied the fact patterns are and how fairly the standard works to identify those who may be guilty, while protecting the innocent from those who want their identities without having a valid reason for suing.

Since the A1327 and A2326 bills conflict with federal law and the New Jersey and federal constitutions, we urge you to withdraw your support for these troubling bills and not waste taxpayer resources defending laws that will inevitably be challenged in court and struck down.

Yours sincerely,

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About the Signers

The Center for Democracy and Technology (CDT) works to promote democratic values and constitutional liberties in the digital age. With expertise in law, technology, and policy, CDT seeks practical solutions to enhance free expression and privacy in global communications technologies. CDT is dedicated to building consensus among all parties interested in the future of the Internet and other new communications media.

craigslist (<http://www.craigslist.org/>) is a simple platform for people to address everyday needs, like getting a job or a place to live. It's run by the people who use it. It receives more than 8 million classified ads per month, and 40 million user postings in more than 80 topical discussion forums.

The Electronic Frontier Foundation (EFF) is a non-profit, member-supported civil liberties organization working to protect rights in the digital world. As the leading and oldest organization working to promote freedom online, EFF actively encourages and challenges industry, government and the courts to support free expression, privacy, and openness in the information society.

Public Citizen is a public interest organization based in Washington, D.C., which has more than 100,000 members, more than 3,500 of them in New Jersey. Since its founding by Ralph Nader in 1971, Public Citizen has encouraged public participation in civic affairs, and has brought and defended many cases involving the First Amendment rights of citizens who participate in civic affairs and who participate in public debates. See generally <http://www.citizen.org/litigation/briefs/internet.htm>. In particular, attorneys for Public Citizen have represented Doe defendants, or been the principal author of briefs as amicus curiae, in several cases where subpoenas have sought to identify the author of anonymous Internet messages, including *Dendrite v. Doe*, *Immunomedics v Doe*, and *Donato v Moldow* in New Jersey.

The U.S. Internet Industry Association (“USIIA”) is the nation’s oldest, largest and most active trade association for providers of broadband and IP services, with more than 200 members engaged in Internet commerce, content, and connectivity. Its mission is to promote the deployment and use of advanced IP-based services, from broadband Internet and IP Video to telephony and other advanced services. The Web Hosting Council of USIIA, a council of members representing the interests of companies that host IP services, includes those engaged in web hosting, electronic communication hosting and ASP applications hosting.

Lyrissa C. Barnett Lidsky is the UF Research Foundation Professor of Law at the University of Florida Levin College of Law.

Jennifer M. Urban directs the Intellectual Property Clinic at the University of Southern California Gould School of Law, a joint project of the Law School, the Annenberg Center

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for Communication and the Information Services Division of USC. The Clinic provides law students with hands-on experience representing the public interest in intellectual property and technology law.