

None of Your Business: Protecting the Right to Write Anonymous Business Reviews Online

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INTRODUCTION

Judicial recognition of the First Amendment right to publish anonymously is a long-standing American tradition.¹ From the days of the American Revolution when Alexander Hamilton, John Jay, and James Madison published the *Federalist Papers* under the pseudonym “Publius,” to the use of usernames on chat rooms and social media platforms, the Supreme Court has continuously articulated the importance of being able to anonymously criticize and opine on those in positions of authority.² While the First Amendment clearly protects anonymous speech, this protection is not absolute.³ There is a fine line between a defamatory statement—which implies an underlying false factual assertion—and a statement of opinion.⁴ The First Amendment only protects the latter.⁵

Unique challenges arise when anonymous Internet criticisms collide with the basic premises underlying First Amendment protection.⁶ The Internet and its anonymous reviewing forums have dramatically changed the nature of public discourse by allowing more diverse perspectives to engage in meaningful public debate without fear of intimidation or retaliation.⁷ In our increasingly online, social, and mobile world, at least eight out of every ten Internet users research a

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1. See *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 158–60 (2002); see also *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995); *Talley v. California*, 362 U.S. 60, 64 (1960).

2. See *McIntyre*, 514 U.S. at 360.

3. See Sophia Qasir, *Anonymity in Cyberspace: Judicial and Legislative Regulations*, 81 *FORDHAM L. REV.* 3651, 3654 (2013).

4. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 267 (1964) (explaining the difference between libelous statements and the privilege of “fair comment” for expressions of opinion).

5. *Id.*

6. See Jason M. Shepard & Genelle Belmas, *Anonymity, Disclosure and First Amendment Balancing in the Internet Era: Developments in Libel, Copyright, and Election Speech*, 15 *YALE J. L. TECH.* 92, 94 (2012–2013) (explaining that mass dissemination, ease of publication, decentralization, and transnationalism have led to an increase in legal claims over the right of speakers to remain anonymous).

7. See *Doe v. Cahill*, 884 A.2d 451, 455–56 (Del. 2005).

product or service online before making a purchase.⁸ In this way, business reviews help predict future consumer behavior while also steering consumers away from businesses failing to provide satisfactory services.⁹ As a consequence of the high value placed on online business reviews, Internet Service Providers (“ISPs”) like Yelp and TripAdvisor receive subpoenas to unmask the identities of anonymous authors of negative business reviews at unprecedented rates.¹⁰

Once the ISP receives the initial request to unmask the identity of an anonymous business reviewer, the ISP will usually try to protect the identity of its user and decline to reveal the anonymous reviewer’s name.¹¹ Consequently, the majority of online defamation lawsuits concern revealing the identity of an anonymous user who has posted a negative statement or review about the plaintiff or the plaintiff’s line of business. Due to the pervasive nature of these claims, this Note will argue that the free speech doctrine should protect the identity of online anonymous business criticisms, which are not provably false, so long as the anonymous reviewer was actually a customer of the business and is expressing his or her own first-hand business experience. Although increasingly difficult to prove that an anonymous business reviewer was actually a customer, this distinction is significant because an uninformed opinion will not actually enhance the marketplace of ideas to the same extent that an informed opinion will. Opinions guide future consumers, and without an informed basis for the opinion, future consumers are guided by mere thoughts without the knowledge and benefit of reading an actual first-hand consumer experience. Therefore, this Note will argue that an informed business review should receive more stringent First Amendment protection than an uninformed one.

This Note analyzes the fine balance between First Amendment protection afforded to anonymous online business reviews and the state’s interest in removing false communications made about a business or business owner. Part I traces the development of anonymity as a protected First Amendment right and will also explain the rise of Internet speech and the protections of Section 230 of the Communications Decency Act for ISPs like Yelp and TripAdvisor.

Part II illustrates the inconsistent application of three conflicting standards used for unmasking anonymous speakers on the Internet and will interpret cases that address these concerns in the context of online business reviews. This section will also touch on the significance of the unanimous passage of the Consumer Review Fairness Act of 2016 and what its enactment into law means for the future of online business reviews. Finally, this section will distinguish commercial speech from non-commercial speech and explain why the distinction is relevant to the level of protection afforded to online business reviews.

8. See Susannah Fox & Maeve Duggan, *Peer-to-Peer Health Care*, PEW RESEARCH CTR. (Jan. 15, 2013), <https://perma.cc/668D-SC5G> (explaining that online consumer reviews are consistently ranked among the most popular activities in the commercial realm).

9. *Id.*

10. See Shepard & Belmas, *supra* note 6, at 95.

11. *Id.* at 96–97.

In Part III, this Note argues that upon receiving a motion to quash from an anonymous business reviewer, courts should incorporate a totality of the circumstances analysis in addition to balancing the interests of the First Amendment with the right to redress against defamatory harms. This section also argues that first-hand opinions about business experiences and commercial goods and services are usually not commercial speech; and therefore, should receive more protection than traditional commercial speech.

In Part IV, this Note concludes by explaining that considerations of the type of speech, the forum used, and the context in which it is posted online should guide the courts' analysis prior to the decision to unmask the author of an anonymous online business review. As part of this totality of the circumstances analysis, courts should keep in mind that forums that do not employ fact-checking protections should not face the same heightened liability as those that do fact-check online communications. Affording less liability to ISPs like Yelp and TripAdvisor than newspapers with extensive layers of editorial support makes sense long-term because consumers have become savvier at determining the reliability of business reviews and are more keen at sifting through the helpful and unhelpful reviews on their own. With this in mind, it would be more beneficial to allow all candid opinions to enter the proverbial marketplace of ideas with the ultimate determination of reliability in the hands of those at their keyboards rather than the businessmen and women who have been criticized.¹² As this Note illustrates, we need anonymous business reviews, for without them, there may be trepidation that businesses will take advantage of consumers' naïve hearts and minds.

I. THE DEVELOPMENT OF ANONYMITY AS A PROTECTED FIRST AMENDMENT RIGHT

A. ANONYMOUS POLITICAL SPEECH RECEIVES HEIGHTENED PROTECTION

Some of the most influential writings in American history were written anonymously or with the protection of pseudonyms.¹³ For instance, many famous political scholars relied on the cloak of anonymity in order to publish writings without fear of retaliation or retribution, or as a means to contribute to a lively debate without being judged or dismissed based on personal attributes or the potential for bias.¹⁴ The core of the First Amendment serves to “protect unpopular individuals from retaliation and their ideas from suppression.”¹⁵ The Supreme

12. See *N.Y. Times Co. v. Sullivan*, 367 U.S. 254, 269 (1964) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957) (“The Constitutional safeguard, we have said, was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”) (internal quotations omitted)).

13. See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995); see also Matthew Mazzotta, *Balancing Act: Finding Consensus on Standards for Unmasking Anonymous Internet Speakers*, 51 B.C. L. REV. 833, 836–37 (2010).

14. See Margot Kaminski, *Real Masks and Real Name Policies: Applying Anti-Mask Case Law to Anonymous Online Speech*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 815, 827 (2013).

15. See *McIntyre*, 514 U.S. at 357.

Court has long held that anonymity is a valuable tool, which can be used as “a shield from the tyranny of the majority.”¹⁶ Political and literary anonymity have long been used for the most constructive purposes, such as educating the public or expressing unpopular views.¹⁷ For instance, during the Revolutionary era, Thomas Paine wrote and published “Common Sense” anonymously to protect against retribution of the British government.¹⁸ Likewise, one of the predominant reasons for the enactment of the First Amendment was to protect the country from England’s licensing laws,¹⁹ which were “intended to stifle criticism of the government by requiring authors to identify themselves in their publications.”²⁰

The Supreme Court recognized the right to speak anonymously for the first time in *Talley v. California* by declaring that a city of Los Angeles ordinance was overbroad and therefore void on its face.²¹ The Los Angeles ordinance at issue barred the distribution of “any hand-bill in any place under any circumstances” unless the handbill contained the names and addresses of the persons who prepared, distributed, or sponsored it.²² The Court held that the ordinance was void because it was not limited to handbills containing content that was obscene or offensive to public morals or that advocates unlawful conduct.²³ The Court relied on the rich historical importance of anonymous speech in Britain and the United States and held that “an identification requirement would tend to restrict freedom to distribute information, and thereby freedom of expression.”²⁴

Anonymous speech in pamphlets, leaflets, brochures, and books already enabled the progression of a lively democratic debate for centuries, long before *Talley* was decided.²⁵ For instance, the *Federalist Papers*, written in favor of the adoption of the Constitution, were even published under fictitious names.²⁶ Throughout the *Talley* Court’s opinion, the Justices continued to emphasize that “identification and

16. *Id.*

17. *See, e.g.*, JOHN STUART MILL, ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 1, 3–4 (R. McCallum ed., 1947).

18. *See* Shepard & Belmas, *supra* note 6, at 100.

19. The Licensing Order of 1643 instituted pre-publication censorship upon Parliamentary England. Specifically, the Licensing Order: (1) required pre-publication licensing; (2) required registration of all printing materials with the names of the author, printer, and publisher in the Register at Stationers’ Hall; (3) allowed for the search, seizure, and destruction of any books offensive to the government; and (4) allowed for the arrest and imprisonment of any offensive writers, printers, and publishers. *See* Licensing Order of June 14, 1643, *reprinted in* 2 COMPLETE PROSE WORKS OF JOHN MILTON 793, 797–99 (1959).

20. GEOFFREY R. STONE ET. AL., CONSTITUTIONAL LAW 1049–53 (5th ed. 2005); *McIntyre*, 514 U.S. at 342.

21. 362 U.S. 60 (1960).

22. *Id.* at 63–64.

23. *Id.* at 65 (explaining that anonymous speech is valued speech and has “been assumed for the most constructive purposes” throughout our history).

24. *Id.* at 64; *see also* *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (“The liberty of the press is not confined to newspapers and periodicals. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.”).

25. *See Talley*, 362 U.S. at 64.

26. *Id.* at 65.

fear of reprisal might deter perfectly peaceful discussions of public matters of importance.”²⁷

Moreover, in his concurrence, Justice Harlan noted that actions “impinging on free speech and association will not be sustained unless the governmental interest asserted to support such impingement is compelling.”²⁸ The State’s argument that its ordinance was aimed at the prevention of “fraud, deceit, false advertising, negligent use of words, obscenity, and libel” was too general to sustain a complete suppression of free speech.²⁹

In 1995, the Supreme Court extended the *Talley* holding to protect anonymous political speech in *McIntyre v. Ohio Elections Commission*.³⁰ The Court struck down an Ohio statute banning distribution of anonymous political campaign literature as an overly broad infringement on the freedom of speech.³¹ Justice Stevens found 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.”³² While the Court acknowledged that the *Talley* holding was specifically related to “advocacy of an economic boycott,” Justice Stevens believed that the Court’s reasoning, “embraced a respected tradition of anonymity in the advocacy of political causes.”³³ For this reason, the *McIntyre* Court addressed anonymity not solely as a political concern but also as a broader literary understanding of the First Amendment by arguing that “requiring an author to identify herself is a direct regulation of the content of the speech.”³⁴

The Court began its analysis by reiterating that when a law burdens core political speech, the Supreme Court will apply “exacting scrutiny,” and the Court only upholds the restriction on the freedom of speech if it is narrowly tailored to serve an overriding state interest.³⁵ The Court rejected the State’s argument that banning anonymous speech would lead to a more informed electorate because the name and address of the author would add little if anything to the reader’s ability to evaluate the document’s message.³⁶ Additionally, while the State’s interest in preventing fraud and libel was found to be significant, especially in the context of election campaigns, “Ohio’s prohibition of anonymous leaflets was not its principal weapon against fraud.”³⁷ Despite the potential for misuse of anonymous speech,

27. *Id.*

28. *Id.* at 66 (Harlan, J., concurring) (citing *NAACP v. Alabama*, 357 U.S. 449, 463 (1964); *Sweezy v. New Hampshire*, 354 U.S. 234, 265 (1957)).

29. *See Talley*, 362 U.S. at 66–67; *but see Talley*, 362 U.S. at 70 (Clark, J., dissenting) (advocating that the Constitution makes no mention of freedom of speech).

30. 514 U.S. 334 (1995).

31. *See id.* at 341 (Stevens, J., majority) (recognizing that “anonymity of an author is not ordinarily sufficient reason to exclude her work product from the protections of the First Amendment”).

32. *Id.* at 342.

33. *Id.* at 343.

34. Kaminski, *supra* note 14, at 835 (quoting *McIntyre*, 514 U.S. at 345).

35. *McIntyre*, 514 U.S. at 347 (citing *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 786 (1978)).

36. *See id.* at 348–49.

37. *Id.* at 350.

since “society accords greater weight to the value of free speech than to the dangers of its misuse,” the interest in having anonymous speech in the metaphorical marketplace of ideas outweighs the government’s interest in unmasking the author’s identities.³⁸ As a result, the Court was not persuaded that the interests in preventing fraud and libel justified the overbroad provision.

The Supreme Court reaffirmed its stance on anonymous political speech in *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton* while applying the precedent in the context of religious proselytizing and non-commercial speech.³⁹ The Watchtower Bible and Tract Society coordinated the preaching activities of Jehovah’s Witnesses in their door-to-door canvassing efforts, an activity which was mandated by their religion.⁴⁰ While the religious literature is free to anyone interested in its contents, the group accepted donations. At issue was whether the members should be forced to register their names and home addresses before going door-to-door in the Village of Stratton.⁴¹ A local congregation of Jehovah’s Witnesses brought this case without applying for a permit because they claimed that even the action of filing an application would infringe upon their First Amendment rights.⁴²

The Court held that any requirement that a group or person must register before speaking publicly on a lawful matter is “incompatible with the requirements of the First Amendment.”⁴³ There must be a balance between the interest of the state and the effect of the regulation on First Amendment rights.⁴⁴ As a matter of policy, the unduly burdensome requirement of informing the government of the desire to speak to neighbors and then obtaining a permit to do so was held to be “offensive to the very notion of a free society” and would constitute a “dramatic departure from our national heritage and constitutional tradition.”⁴⁵

The Court based its decision on the fact that: (1) the permit process made it impossible for a person to support a cause anonymously; (2) some people, because of either their “religious scruples” or their unpopular views will refrain from applying for a license to go door-to-door; and (3) that the ordinance would likely serve as a ban on spontaneous speech because the license was a mandatory prerequisite to speaking in the first place.⁴⁶ While the Court recognized the Village’s legitimate concern of preventing fraud, crime, and respecting the privacy of the residents, these interests failed to justify the overarching nature of the ordinance.⁴⁷

38. *Id.* at 357.

39. 536 U.S. 150 (2002).

40. *See id.* at 158, 160; *see also* *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943) (Jehovah’s Witnesses take literally the mandate of the Scriptures, “Go Ye into all the world, and preach the gospel to every creature,” specifically from “house-to-house”).

41. *Watchtower*, 536 U.S. at 160.

42. *Id.*

43. *Id.* at 164 (citing *Thomas v. Collins*, 323 U.S. 516, 539–40 (1945)).

44. *See id.* at 163.

45. *Id.* at 165–66.

46. *Id.* at 166–67.

47. *Id.* at 168.

Moreover, scholars have interpreted the *Watchtower* holding as affirmative proof that anonymity can be contextual.⁴⁸ For instance, Margot Kaminski, current Assistant Professor of Law at the Ohio State University Moritz College of Law and former executive director of the Information Society Project at Yale Law School, reasoned that in the context of face-to-face communications, although the Jehovah's Witnesses would be revealing their faces at the doors of each home visited, they would "still maintain their anonymity because their faces but not their identities are revealed."⁴⁹ Her conclusion and the interpretation from the language in *Watchtower* suggest, "anonymity is a communicative tool employed by speakers in the context of a relationship."⁵⁰

B. THE RISE OF INTERNET SPEECH AND THE PROTECTIONS OF SECTION 230 OF THE COMMUNICATIONS DECENCY ACT

The Internet has become omnipresent, and as a result, it is now possible for anyone to "become a town crier with a voice that resonates farther than it could from any soapbox."⁵¹ As a general principle, the free speech guarantees of the First Amendment prevent the government from controlling what people see, read, speak, or hear online, unless that speech is classified as defamation, incitement, obscenity, or pornography produced with children.⁵² The fact that society may find speech offensive is not enough to censor it, as was the case in the landmark decision of *Reno v. ACLU*.⁵³

In 1997, the Supreme Court unanimously extended full First Amendment protection to the Internet for the first time in *Reno v. ACLU*.⁵⁴ At issue was the constitutionality of two provisions of the Communications Decency Act (the "CDA"), which prohibited the transmission of "indecent" and "patently offensive" material to minors through the Internet.⁵⁵ In the opinion, the Justices agreed that the anti-indecency provisions of the CDA violated the First Amendment's guarantee of freedom of speech because the CDA contained content-based blanket restrictions on speech, imprecise language, and suppressed a large amount of speech that adults had a constitutional right to receive.⁵⁶ Consequently, certain provisions in the CDA were held to be unduly burdensome and struck down.⁵⁷

The Court held that, in the absence of evidence to the contrary, there is a presumption that "governmental regulation of the content of speech is more likely

48. *See id.* at 167 ("The fact that circulators revealed their physical identities did not foreclose our consideration of the circulators interest in maintaining their anonymity.").

49. Kaminski, *supra* note 14, at 838.

50. *Id.*

51. *Reno v. ACLU*, 521 U.S. 840, 870 (1997).

52. *See Simon & Shuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring).

53. *See Reno*, 521 U.S. at 870.

54. *Id.*

55. *Id.* at 877.

56. *See id.* at 878–85.

57. *Id.* at 884.

to interfere with the free exchange of ideas than to encourage it.”⁵⁸ Therefore, when evaluating the free speech rights of adults online, the Court has found “no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet]” and also found that “sexual expression which is indecent but not obscene is protected by the First Amendment.”⁵⁹

As its title suggests, the CDA is “intended to promote decency on the Internet.”⁶⁰ Since the holding in *Reno v. ACLU*, the way in which publishers and speakers use the Internet has evolved, with an increasing number of ISPs—such as email services, social media platforms, and business-reviewing forums—needing protection against indecent content published by its users and against third parties generally.⁶¹ However, unlike the controversial anti-indecency provisions struck down in the *Reno v. ACLU* decision, Section 230 of the CDA, in full force today, creates a broad protection for ISPs, which has allowed free speech and creative thought to flourish online.⁶² According to Section 230: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”⁶³ The CDA defines an information content provider as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”⁶⁴ Courts have interpreted Section 230 broadly, holding that it largely shields ISPs and website operators from defamation and privacy liability for content posted independently online by third parties, including anonymous postings.⁶⁵ The ISP will not lose its immunity even if the ISP edits the content provided by the third party, “so long as [the] edits do not substantially alter the meaning of the original statements.”⁶⁶

In causes of action for online defamation, immunity in favor of the ISP has largely been enforced.⁶⁷ This legal and policy framework has allowed “YouTube

58. *Id.* at 885.

59. *Id.* at 870; *see also* *Sable Commc’ns of Cal., Inc. v. FCC*, U.S. 115, 126 (1989); *Carey v. Population Servs. Int’l*, 431 U.S. 678, 701 (1977) (“The fact that protected speech may be offensive to some does not justify its suppression.”).

60. *See* *Doe v. Am. Online, Inc.*, 783 So. 2d 1010, 1024 (Fla. 2001) (citing John Schwartz, *Coalition to File Suit Over Internet Rules: Action Targets New Law as Unconstitutional*, WASH. POST, (Feb. 26, 1996), at A4).

61. *See* Shepard & Belmas, *supra* note 6, at 94.

62. *See* 47 U.S.C. § 230, a *Provision of the Communication Decency Act*, ELEC. FRONTIER FOUND., <https://perma.cc/9J3H-V6XM> (last visited Jan. 15, 2017).

63. 47 U.S.C. § 230(c) (2012).

64. *Id.* at § 230(f)(3).

65. *See* *Johnson v. Arden*, 614 F.3d 785, 791 (8th Cir. 2010); *see also* *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 119, 1120–25 (9th Cir. 2003); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330–35 (4th Cir. 1997).

66. *Publishing the Statements and Content of Others*, DIGITAL MEDIA LAW PROJECT, <https://perma.cc/JX2H-N88Z> (last visited Apr. 18, 2017).

67. *See* *Goddard v. Google, Inc.*, 2008 WL 5245490 (N.D. Cal. Dec. 17, 2008) (upholding immunity for Google because misleading advertisements were created by third parties); *see also* *Bratzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003) (upholding immunity for a website operator for distributing an email to a listserv); *Carafano*, 339 F.3d at 1120–25 (upholding immunity for Internet dating service provider despite third party’s creation of false profile); *Blumenthal v. Drudge*, 992 F. Supp. 44, 49–53

and Vimeo users to upload their own videos, Amazon and Yelp to offer countless user reviews, craigslist to host classified ads, and Facebook and Twitter to offer social networking to hundreds of millions of Internet users.⁶⁸ Once ISP immunity is established, plaintiffs alleging defamation can only sue the third party speakers themselves if they want to recover damages.⁶⁹ However, when the third party speaker is an anonymous poster and the online forum is immune from liability through Section 230, the ability to “unmask” the anonymous speaker has hinged on which jurisdiction hears the case and which of the diverging standards the court has chosen to apply.⁷⁰ Below, this Note will explain the three predominant standards used to unmask an anonymous speaker.

II. THE FRACTURED STATE OF ANONYMOUS SPEECH IN ONLINE DEFAMATION CASES

Pursuant to the Restatement (Second) of Torts, the elements of defamation include: (1) a false and defamatory communication concerning another; (2) an unprivileged communication of the defamatory statement to a third party with the communication being intentional or at least negligent; and (3) special damages.⁷¹ In order to be properly classified as defamatory, the statement must also have a tendency to harm the plaintiff’s reputation.⁷² Anonymous online speech poses a unique challenge in the beginning stages of initiating a lawsuit because the plaintiff is unable to identify the proper party to sue without the help of the ISP.⁷³ When the identity of an anonymous poster is unknown, the allegedly defamed plaintiff has little choice but to “file a ‘Doe’ lawsuit without [a] named defendant and then serve a subpoena on the Doe’s Internet Service Provider” to obtain the user’s identity.⁷⁴ Currently no single test for unmasking an anonymous writer is dispositive; rather, each jurisdiction modifies preexisting tests, which contributes to the muddled state of the various unmasking standards we see today. The remainder of this Section will articulate the three most cited standards and then demonstrate how these standards have been applied to novel online defamation cases including those involving business-reviewing forums.

(D.D.C. 1998) (AOL’s agreement with the contractor allowing AOL to modify or remove such content did not make AOL the “information content provider” because the content was created by an independent contractor); *Zeran*, 129 F.3d at 330–35.

68. 47 U.S.C. § 230, a *Provision of the Communication Decency Act*, ELEC. FRONTIER FOUND., <https://perma.cc/9J3H-V6XM> (last visited Jan. 15, 2017).

69. See Clay Calvert, Kayla Gutierrez, Karla D. Kennedy, & Kara Carnley Murrhee, *David Doe v. Goliath, Inc.: Judicial Ferment in 2009 for Business Plaintiffs Seeking the Identities of Anonymous Online Speakers*, 43 J. MARSHALL L. REV. 1, 4 (2009).

70. See Amy Pomerantz Nickerson, *Coercive Discovery and the First Amendment: Towards a Heightened Discoverability Standard*, 57 UCLA L. REV. 841, 864–67 (2010) (reasoning that courts differ markedly in the strength of showing deemed satisfactory to unmask an anonymous online poster).

71. 4–35 BUSINESS TORTS § 35.10 (Zamore, Joseph D. et al. eds., 2015).

72. *Id.*

73. See Calvert, Gutierrez, Kennedy, & Murrhee, *supra* note 69, at 15.

74. See Jesse Lively, *Can a One Star Review Get Sued? The Right to Anonymous Speech on the Internet and the Future of Internet Unmasking Statutes*, 48 J. MARSHALL L. REV. 693, 700 (2015).

**A. CONFUSION IN SELECTING THE APPROPRIATE UNMASKING STANDARD:
FROM GOOD FAITH TO BALANCING TO SUMMARY JUDGMENT**

1. *In re Subpoena Duces Tecum to America Online and the Good Faith Test*

In 2000, a Virginia Circuit Court was tasked in *In re Subpoena Duces Tecum to America Online* with determining when an ISP was legally required to provide the contact information of its subscribers so that the allegedly defamed plaintiff could name them in a suit.⁷⁵ In the case, the plaintiff, Anonymous Publicly Traded Company (“APTC”), alleged that four America Online Inc. (“AOL”) subscribers published “defamatory material, misrepresentations, and confidential insider information” about APTC in an Internet chat room.⁷⁶ APTC served subpoenas *duces tecum* on AOL in order to unmask the four anonymous chat room users.⁷⁷ AOL countered the subpoena request with a motion to quash, arguing that the subpoena would “unreasonably impair[] the First Amendment right of the John Doe to speak anonymously on the Internet.”⁷⁸

The court held that the right to speak anonymously on Internet chat rooms and message boards is within the scope of the First Amendment.⁷⁹ However, despite conceding that AOL subscribers use the chat rooms and message boards with the desire to maintain anonymity, and allowing plaintiffs to issue subpoenas *duces tecum* on ISPs like AOL would have “an oppressive effect on AOL,” the court nonetheless created a nearly impossible standard that ISPs must meet to defend against these types of subpoenas.⁸⁰ A non-party ISP must provide identifying information of a subscriber when:

- (1) the court is satisfied by the pleadings or evidence supplied to that court; (2) that the party requesting that subpoena has a legitimate good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where suit was filed; and (3) the subpoenaed identity information is centrally needed to advance that claim.⁸¹

Ultimately, the court found that the state of Indiana had a “compelling state interest to protect companies” from the anonymous release of “confidential insider information.”⁸² As a result, AOL’s motion to quash was denied.⁸³

The test articulated by the Virginia Circuit Court has subsequently been referred to as the “good faith test.”⁸⁴ However, most courts since the *AOL* decision have

75. 52 Va. Cir. 26 (2000), *rev’d on other grounds*, *Am. Online, Inc. v. Anonymous Publicly Traded Co.*, 261 Va. 350 (2001).

76. *Id.* at 35.

77. *Id.* at 26–27.

78. *Id.* at 28.

79. *Id.* at 34.

80. *Id.* at 32–33.

81. *In re Subpoena Duces Tecum*, 52 Va. Cir. 26, 37 (2000), *rev’d on other grounds*, *Am. Online, Inc. v. Anonymous Publicly Traded Co.*, 261 Va. 350 (2001).

82. *Id.* at 35 (reasoning that to hold in favor of AOL would leave companies such as APTC defenseless).

83. *Id.* at 37.

failed to adopt the lenient good faith standard, out of concern that the standard is too easy for a plaintiff to satisfy and provides almost no protection to anonymous online speakers.⁸⁵

2. *Dendrite International Inc. v. Doe No. 3* and the Balancing Test

In *Dendrite International Inc. v. Doe No. 3*, Dendrite, a New Jersey corporation specializing in the “Pharmaceutical and Consumer Package Goods industries,” sought to compel an ISP to reveal the identity of a John Doe No. 3 on the Yahoo Dendrite message boards.⁸⁶ Yahoo, an ISP, provides an interactive service where users can post comments on message boards related to the financial matters of any particular company.⁸⁷ Between the months of March and June of 2000, John Doe No. 3 posted nine comments about Dendrite through the Yahoo message boards under the pseudonym “xxplr.”⁸⁸ Dendrite alleged that John Doe No. 3 defamed the Dendrite business and misappropriated its trade secrets by falsely stating that Dendrite changed its revenue recognition accounting system, that Dendrite was “shopping” the company, and that Dendrite was no longer desirable for potential purchasers because it was no longer competitive.⁸⁹ As a result of these allegedly defamatory statements and a subsequent drop in its stock prices, Dendrite sought to identify John Doe No. 3, but the trial court judge held that Dendrite had “not made a prima facie case of defamation against John Doe No. 3, as Dendrite has failed to demonstrate that it was harmed by any of the posted messages.”⁹⁰

When facing a request to compel disclosure through subpoena, the court advised future New Jersey trial courts to follow the *Dendrite* Court’s five-factor test before disclosing the identity of the anonymous Internet poster.⁹¹ In order to accord the First Amendment the weight it has historically been given, courts should: (1) require the plaintiff to take efforts to notify the anonymous poster that they are the subject of the subpoena and provide a reasonable opportunity for the anonymous poster to file and serve opposition to the subpoena or similar disclosure request; (2) require the plaintiff to identify and explain the exact statements allegedly made by the anonymous poster which are actionable forms of speech; and combined, steps (3) and (4) require that the plaintiff’s cause of action can withstand a motion to dismiss for failure to state a claim upon which relief can be granted, and the plaintiff must also produce sufficient evidence supporting each element of its cause

84. See Ryan M. Martin, *Freezing the Net, Rejecting a One-Size-Fits-All Standard for Unmasking Anonymous Internet Speakers in Defamation Lawsuits*, 75 U. CIN. L. REV. 1217, 1227 (2007).

85. See *Doe v. Cahill*, 884 A.2d 451, 457 (Del. 2005) (explaining that too low a standard will chill potential anonymous posters from speaking out); see also *Dendrite Int’l, Inc. v. Doe No. 3*, 775 A.2d 756, 771 (N.J. Super. Ct. App. Div. 2001).

86. *Dendrite Int’l, Inc.*, 775 A.2d at 760.

87. See *id.* at 761.

88. *Id.* at 762.

89. See *id.* at 763.

90. *Id.* at 764.

91. *Id.* at 760.

of action on a prima facie basis.⁹² Only if these steps are satisfied must the court then (5) balance the defendant's First Amendment right of anonymous speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to proceed properly.⁹³

In *Dendrite*, the trial judge considered these factors and determined that Dendrite failed to meet the third prong, which required that the cause of action be capable of withstanding a motion to dismiss.⁹⁴ Specifically, the judge found that "Dendrite had not established that fluctuations in its stock prices were a result of John Doe No. 3's postings, and could not find any nexus between the postings and the drop in Dendrite's stock prices."⁹⁵

By requiring a plaintiff's complaint to establish a prima facie case with a sufficient nexus between the allegedly defamatory language and the harm in order to withstand a motion to dismiss, the *Dendrite* court's test is much more stringent than AOL's.⁹⁶ For the first time, a court identified as a primary concern the balancing of a defendant's right to speak anonymously against the plaintiff's right to seek redress. The *Dendrite* balancing test coupled with the motion to dismiss and prima facie standard makes the test easier for the anonymous speaker to satisfy than the AOL good faith test.⁹⁷ However, because the application of the *Dendrite* factors "must be undertaken and analyzed on a case-by-case basis" other jurisdictions have applied and modified the test to inconsistent results.⁹⁸

3. *Doe v. Cahill* and the Summary Judgment Test

In 2005, Delaware adopted a new standard for determining when a plaintiff who faced alleged defamation could unmask the identity of an anonymous poster of allegedly defamatory speech.⁹⁹ In *Doe v. Cahill*, John Doe No. 1 used the anonymous alias, "Proud Citizen," when posting statements made on an Internet website sponsored by the Delaware State News, called the "Smyrna/Clayton Issues Blog."¹⁰⁰ At the top of the website, readers could find that blog postings were

92. *Id.*

93. *Compare id.* at 760–61, with *Lassa v. Rongstad* 718 N.W.2d 673, 687 (Wis. 2006) (rejecting Delaware's summary judgment standard in favor of a motion-to-dismiss standard but not explaining how, or if, a motion-to-dismiss would incorporate a balancing test).

94. *Dendrite Int'l Inc. v. Doe No. 3*, 775 A.2d 756, 769 (N.J. Super. Ct. App. Div. 2001).

95. *Id.* at 771.

96. *See* Calvert, Gutierrez, Kennedy, & Murrhee, *supra* note 69, at 20 (citing Nathaniel Gleicher, *John Doe Subpoenas: Toward a Consistent Legal Standard*, 118 YALE L.J. 320, 340 (2008)).

97. *See* Martin, *supra* note 84, at 1240–41 (arguing for the abandonment of the good faith standard because the standard gives "almost no protection to anonymous online" speakers).

98. *See* Mazzotta, *supra* note 13, at 846 (explaining that unmasking standards have been formulated on a jurisdiction-by-jurisdiction basis, resulting in a "morass" of unmasking opinions); *see also* Calvert, Gutierrez, Kennedy, & Murrhee, *supra* note 69, at 46 ("There is fundamental disagreement about the necessity of the *Dendrite* balancing-of-the-interests prong.").

99. *Doe v. Cahill*, 884 A.2d 451, 454 (Del. 2005).

100. *Id.*

made in a “forum for opinions about public issues.”¹⁰¹ At issue in this case were two statements posted on the blog forum concerning Cahill’s job performance as a City Councilman of Smyrna, Delaware.¹⁰² One of the statements noted character flaws and Cahill’s obvious mental deterioration while the other statement misspelled Cahill’s last name as “Gahill.”¹⁰³

Cahill learned that the ISP, Comcast Corporation, owned the anonymous Doe’s IP address.¹⁰⁴ With the IP address, Cahill sought a trial court order to disclose Doe’s identity, but in response, the Doe filed an “Emergency Motion for a Protective Order.”¹⁰⁵ The trial judge denied the Doe’s motion for a protective order, formulating a standard that mimicked the good faith test used by the *AOL* court.¹⁰⁶ Under the good faith standard the court merely required that Cahill establish: (1) that there was a legitimate good faith basis upon which to bring the underlying claim; (2) that the identifying information sought was directly and materially related to the claim; and (3) that the information could not be obtained from any other source.¹⁰⁷

On appeal, the Delaware Supreme Court rejected the trial judge’s application of the good faith test as too low a threshold.¹⁰⁸ The court reasoned that the good faith test would cause substantial harm to anonymous defendants because plaintiffs can always resort to extrajudicial relief by responding directly to the anonymous post.¹⁰⁹ An allegedly defamed plaintiff is uniquely situated to mitigate harm to his reputation, because the Internet provides a forum whereby “an anonymous poster can respond instantly . . . on the same site or blog, and thus, can almost contemporaneously, respond to the same audience that initially read the allegedly defamatory statements.”¹¹⁰

Instead of the good faith test, the Delaware Supreme Court held that in a defamation case involving an anonymous defendant, irrespective of whether the case involves the Internet or traditional print media, the plaintiff must satisfy a “summary judgment” standard before obtaining the identity of the anonymous defendant.¹¹¹ The summary judgment standard was developed from a modified version of the *Dendrite* standard, with the Delaware Supreme Court requiring only two steps: (1) that the plaintiff take efforts to notify the anonymous poster that they are the subject of the subpoena, including posting a message on the ISP’s message

101. *Id.*

102. *Id.*

103. *See id.*

104. *See id.* (explaining that an IP address is a unique electronic number that identifies a particular computer using the Internet assigned through the ISP. Once the date and time of the posting is ascertained, the ISP can determine the identity of the subscriber).

105. *Doe v. Cahill*, 884 A.2d 451, 455 (Del. 2005).

106. *See id.*

107. *Id.*

108. *See id.* at 457.

109. *See id.* at 457 (reasoning that the “sue first, ask questions later” approach coupled with “a standard only minimally protective of the anonymity of the defendants” will lead anonymous writers to self-censor their speech to prevent the unmasking of their identity).

110. *Id.* at 465.

111. *Doe v. Cahill*, 884 A.2d 451, 457–65 (Del. 2005).

boards where the allegedly defamatory statement was originally posted, and provide a reasonable opportunity for the anonymous poster to file and serve opposition to the subpoena or similar disclosure request; and (2) the plaintiff's complaint and all information provided to the court should be carefully reviewed to determine whether the plaintiff has satisfied a summary judgment standard.¹¹² The court explicitly rejected the second and fourth requirements of the *Dendrite* test, explaining that because the summary judgment standard requires the plaintiff to "quote the defamatory statements in his complaint" and because the summary judgment standard is itself a balancing test, these elements would be redundant.¹¹³

As applied to the *Cahill* facts, under the summary judgment standard, the court found that referring to Cahill as "Gahill" is "just as likely to be a typographical error as an intended misguided insult," but that a reasonable person could not sensibly believe the typography to be a factual assertion that Cahill "had an extramarital same-sex affair."¹¹⁴ Additionally, given the fact that "the guidelines at the top of the blog specifically state that the forum is dedicated to opinions about issues in Smyrna" these statements by the anonymous Doe could only be interpreted as non-actionable opinion.¹¹⁵

There is a spectrum of reliability for sources on the Internet.¹¹⁶ The court understood that blogs and discussion rooms have less indicia of reliability than a newspaper's website with layers of editorial support.¹¹⁷ Relying on opinions from other federal court decisions, the court explained that when messages are not posted on a newspaper's editorial pages, courts should consider "both the immediate context and broader social context" to determine whether an allegedly defamatory statement could be interpreted as an assertion of actual facts.¹¹⁸

4. Inconsistent Judicial Applications of Unmasking Standards

Following the *Cahill*, *Dendrite*, and *AOL* holdings, courts across the country have formulated their own variations on these unmasking standards. Significantly, because no two defamation cases will have identical facts and because state statutes

112. *Id.* at 460–61.

113. *Id.* at 461 ("The defamation plaintiff, as the party bearing the burden of proof at trial, must introduce evidence creating a genuine issue of material fact for all elements of a defamation claim within the plaintiff's control.").

114. *Id.* at 467.

115. *Id.*

116. *See id.* at 465.

117. *See Doe v. Cahill*, 884 A.2d 451, 465 (Del. 2005) ("Blogs and chat rooms tend to be vehicles for the expression of opinions; by their very nature, they are not a source of facts or data upon which a reasonable person would rely."). *See also* *Rocker Mgmt., LLC v. John Does 1 through 20*, U.S. Dist. LEXIS 16277, *5 (N.D. Cal. 2003) (emphasizing that messages which are "replete with grammar and spelling errors," "vulgar and offensive," and "filled with hyperbole" are unlikely to be interpreted as factual assertions).

118. *Id.* at 446 (citing *SPX Corp. v. Doe*, 253 F. Supp. 2d 974, 980–81 (N.D. Ohio 2003) (contending that a reasonable person can assume that statements made in a newspaper, either online or in print are "factually based and researched" but this is not necessarily true for statements made on blogs)).

largely govern defamation, the result has been mass confusion and inconsistent jurisdiction-by-jurisdiction results. Even though state courts are often the first to hear defamation cases, all of these cases have federal overtones and national implications.¹¹⁹

Four years after *Cahill*, the Maryland Court of Appeals in *Independent Newspapers v. Brodie* addressed how the state would handle causes of action to identify an anonymous Internet poster in a defamation case.¹²⁰ In *Brodie*, the plaintiff asserted that the anonymous postings made on *Independent Newspapers'* registered Internet forum accusing him of "maintaining unsanitary food service establishments and of setting fire to a historic home" were defamatory.¹²¹ The trial court granted immunity to *Independent Newspapers* because of Section 230 of the CDA but still ordered the newspaper to comply with the subpoena and reveal the identity of the anonymous posters.¹²² On appeal, the Court of Appeals held that the trial judge abused his discretion in denying the protective order and also explained that the *Dendrite* standard, requiring "notice and opportunity to be heard, coupled with a showing of a prima facie case and the application of a balancing test" would be the appropriate unmasking standard.¹²³

Conversely, the Arizona Court of Appeals adopted a hybrid test in *Mobilisa, Inc. v. Doe*, combining elements from both *Dendrite* and *Cahill*.¹²⁴ The court agreed that notice and opportunity coupled with summary judgment were appropriate elements to apply, but explicitly disagreed with the *Cahill* court's conclusion that a balancing test was unnecessary.¹²⁵ According to the Arizona Court of Appeals, the fact that a plaintiff survives the summary judgment portion of the analysis does not necessarily "account for factors weighing against disclosure."¹²⁶ Due to the vast array of factual possibilities inherent in a defamation allegation, the balancing element should not be abandoned because it provides the necessary additional safeguard aimed to promote "free speech and individual privacy."¹²⁷

However, in *Krinsky v. Doe 6*, a Sixth Circuit Court of Appeals decision, the court held that it was both "unnecessary and potentially confusing to attach a

119. See *Defamation FAQs*, MEDIA LAW RES. CTR., <https://perma.cc/HDZ6-L4J2> (last visited Apr. 17, 2017). The elements of defamation are mostly identical throughout the country, but there can be substantive and procedural differences because each state has its own state statute. It is not uncommon for a plaintiff and the online forum containing the allegedly defamatory content to occupy different jurisdictions, opening up the possibility for a federal diversity action.

120. 966 A.2d 432 (Md. 2009).

121. *Id.* at 442.

122. *See id.*

123. *Id.* at 456.

124. 170 P.3d 712, 721 (Ariz. Ct. App. 2007).

125. *See id.* at 720.

126. *Id.* (explaining that without the balancing step lower courts "would not be able to consider factors such as the type of speech involved, the speaker's expectation of privacy, the potential consequence of a discovery order to the speaker and those similarly situated, the need for the identity of the speaker to advance the requesting party's position, and the availability of alternative discovery methods"); see also *Shoen v. Shoen*, 804 P.2d 787, 792 (Ariz. 1990) ("In order to obtain a preliminary injunction, the requesting party must show, among other things, that a balance of hardship favors it.").

127. *See id.* at 721.

procedural label . . . to the showing required of a plaintiff seeking the identity of an anonymous speaker on the Internet.”¹²⁸ Much like the decision in *Mobilisa*, the *Krinsky* court also adopted a hybrid of the *Dendrite* and *Cahill* standards, choosing to keep the *Cahill* notice element with modifications, the prima facie showing from *Dendrite*, while also requiring that discovery of the anonymous defendant’s identity be necessary to pursue the claim.¹²⁹ The *Krinsky* court’s decision was unique in choosing to focus “on the medium in which the comments were posted” and taking into consideration both “the value of the financial message board as a forum for ordinary John Does to discuss corporate affairs and the distinctive nature of discourse on those boards.”¹³⁰

Anonymous defamation subpoenas continue to present unique challenges to plaintiffs and courts. Specifically, while there is a “growing consensus on several elements of the appropriate tests,” such as the notice element and some form of balancing the First Amendment with an individual plaintiff’s right to redress harm, many courts continue to apply vastly different tests to cases involving similar factual tendencies.¹³¹ While many scholars continue to insist that a uniform test will help develop consistency in future case law and guide allegedly defamed plaintiffs when bringing suit, the rest of this Note will argue that a fact-driven case-by-case inquiry is necessary in the context of anonymous online consumer business reviews.¹³² Just as the *Cahill* and *Krinsky* courts began to consider the online forum, expectation of readers, and the importance of deciphering opinion from actionable defamation, all courts should take into consideration the “totality of the circumstances” prior to unmasking an anonymous poster.¹³³

B. DISTINGUISHING DEFAMATION FROM NEGATIVE BUSINESS REVIEWS

Like all forms of speech, anonymous speech’s protection will depend on the category of speech involved. The remainder of this Note will analyze relevant precedent and argue that anonymous business reviews on online platforms such as Yelp and TripAdvisor fall under the category of protected speech unless the plaintiff can plead with particularity in the complaint that the business review was defamatory.

As of the third quarter of 2016, over 115 million reviews of business-related activities have been published on Yelp, with the majority of these reviews aimed at

128. 159 Cal. App. 4th 1154, 1170 (2008) (“It would generate more confusion to define an obligation by referring to a motion procedure.”).

129. See *id.* at 1172 (holding that the plaintiff must make a prima facie showing in order to overcome a defendant’s motion to quash a subpoena seeking to unmask the author’s identity).

130. Calvert, Gutierrez, Kennedy, & Murrhee, *supra* note 69, at 38–39.

131. Shepard & Belmas, *supra* note 6, at 134.

132. See Lively, *supra* note 74, at 723–24; Nickerson, *supra* note 70, at 849; Calvert, Gutierrez, Kennedy, & Murrhee, *supra* note 69, at 8 (arguing that courts should “create a paradigm or framework for determining” which test should be applied uniformly).

133. See Martin, *supra* note 84, at 1237–38, 1242 (arguing that a one-size-fits-all mentality is misguided, although, this analysis is limited to cases involving political speech versus non-political speech and the need to consider actual malice).

shopping, restaurants, and home and local businesses.¹³⁴ However, business-related reviews become problematic when the business or business owner seeks to compel the ISP to unveil the anonymous user merely to “discover the identity of their anonymous critic and intimidate or silence them.”¹³⁵ Sometimes these lawsuits are legitimate, but increasingly they have become a powerful way for a business to stifle unfavorable criticism.¹³⁶

1. *Yelp v. Hadeed*: A Procedural Victory for Anonymous Free Speech Online

In *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, a carpet cleaning business sought to unmask the identity of seven anonymous Yelp reviewers because Hadeed discovered that it could not match their reviews with “actual customers in its database.”¹³⁷ Yelp objected to the subpoena *duces tecum* requests served by Hadeed and at trial argued first that “the First Amendment requires a showing of merit on both the law and facts” and second that the “circuit court lacked jurisdiction to subpoena its documents.”¹³⁸

Yelp is an online social-networking website that allows its registered users to read and post business reviews.¹³⁹ Users are permitted to choose a screen name when posting reviews, and even though Yelp does not require users to use their actual name or residence, Yelp generally records the IP address from which the posting was made.¹⁴⁰ All Yelp users must abide by Yelp’s Terms of Services, which include the requirement that users “base their reviews on their own personal experiences.”¹⁴¹

In its opinion, the court unequivocally stated that a Yelp review is generally “entitled to First Amendment protection because it is a person’s opinion about a business they patronized.”¹⁴² So long as the Yelp reviewer was a “customer of the specific company” and he “posted his review based on his personal experience with the business” the review should be considered non-actionable opinion.¹⁴³ Even though Hadeed never claimed that the seven Yelp reviewers’ statements were false or caused harm to his reputation, the court held in favor of enforcing the subpoena against Yelp.¹⁴⁴ The court classified the Yelp reviews as a “form of [commercial] expression related solely to the economic interests of the speaker and its

134. See *10 Things You Should Know About Yelp*, YELP, <https://perma.cc/8PPP-847H> (last visited Feb. 8, 2017).

135. Calvert, Gutierrez, Kennedy, & Murrhee, *supra* note 69, at 4.

136. *Id.*

137. 752 S.E.2d 554, 567 (Va. Ct. App. 2014), *rev’d on other grounds*, 770 S.E.2d 440 (2015).

138. *Id.* at 559.

139. See *id.* at 557.

140. See *id.*

141. *Id.* at 558.

142. *Id.*

143. *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 752 S.E.2d 554, 558 (Va. Ct. App. 2014), *rev’d on other grounds*, 770 S.E.2d 440 (2015).

144. See *id.* at 570.

audience.”¹⁴⁵ Moreover, instead of adopting the standards from either *Dendrite* or *Cahill*, the court relied on Virginia legislation, which uses the less protective good faith threshold.¹⁴⁶

The Court of Appeals opinion has been heavily criticized. A large concern has been Virginia’s reliance on the legislature in developing an unmasking standard largely abandoned or never accepted in other jurisdictions.¹⁴⁷ In a law review article, Jesse Lively focuses on the erroneous holding, explaining that by “essentially determining that leaving a review is enough reason to satisfy the good faith requirement of section 8.01–407.1,” the court ignored the First Amendment rights of the anonymous reviewers.¹⁴⁸ Lively argued good faith was not the national consensus standard because of the “need to strike just the right balance between the interests of the accused defendant’s First Amendment right to speak anonymously with the plaintiff’s interest in attaining reparation for allegedly tortious speech.”¹⁴⁹

Without addressing the First Amendment implications, the Virginia Supreme Court overturned the Court of Appeals ruling on procedural grounds.¹⁵⁰ The court explained that Virginia courts lack jurisdiction to subpoena Yelp’s records because that information is held in California.¹⁵¹ As the law stands, the landscape for determining which standard should govern whether anonymous online business reviewers can be subpoenaed depends on the value each state places on the balance between freedom of speech and the right to redress for a harmed reputation.¹⁵²

2. Moving Toward a Totality of the Circumstances Analysis for Online Business Reviews

Over time, it has become increasingly more evident that courts want to distance themselves from the good faith threshold applied in *Yelp* in favor of adopting a more free speech friendly standard. Although few courts outright require a totality of the circumstances review, subliminally, judges are beginning to take into consideration the context of the online speech and its broader social value to both the speaker and their audiences.

Defamation lawsuits against ISPs extend beyond Yelp. For instance, business owners seeking to get business-related reviews taken down have also sued TripAdvisor. In *Seaton v. TripAdvisor*, a hotel owner sued TripAdvisor, an interactive website similar to Yelp that allows users to rate and review travel-related businesses, because the website published a list of the “Dirtiest Hotels”

145. *Id.* at 560–61 (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 561 (1980)).

146. *See id.* at 563.

147. *See id.* at 562–63 (holding that the party need only have a “legitimate, good faith basis”).

148. Lively, *supra* note 74, at 722.

149. *Id.* at 723–24.

150. *Yelp, Inc. v. Hadeed Carpet Cleaning*, 770 S.E.2d 440, 445 (Va. 2014).

151. *See id.*

152. *See* Ed Lieber, *Court Defends the Anonymity of Yelp Reviewers*, SMALL BUS. TRENDS (May 3, 2015), <https://perma.cc/8NQQ-V48M>.

based on its users' rankings, which allegedly defamed one of Seaton's Grand Resort hotels.¹⁵³

The court held that because TripAdvisor's business model required the conveyance of its individual users' personal opinions based on their first-hand business experiences, the list was constitutionally protected speech.¹⁵⁴ This case can be distinguished from the *Hadeed* case, because the court took into consideration the totality of the circumstances in order to characterize the review as hyperbolic opinion and commentary rather than a false assertion of fact.¹⁵⁵ Seaton failed to state a plausible defamation action because "TripAdvisor's use of the word 'dirtiest' amounts to rhetorical hyperbole" and the "general tenor" of the posting undermines an interpretation that the statements were anything more than the "subjective opinions of travelers who use TripAdvisor."¹⁵⁶ In reaching this conclusion, the court determined that the post on TripAdvisor would be reasonably interpreted to reflect examples or specific experiences of a few of TripAdvisor's users and not a false assertion of defamatory fact.¹⁵⁷ Because Seaton failed to state a plausible claim for defamation, the court granted TripAdvisor's motion to dismiss.¹⁵⁸

In another lawsuit against TripAdvisor, a Multnomah County Circuit Court judge for the state of Oregon sided with TripAdvisor when deciding not to compel the travel website to unmask an anonymous hotel reviewer using the screen name "12Kelly."¹⁵⁹ The review about the Ashley Inn stated, "laundry and housekeeping are either high or drunk" and also that "breakfast is nasty, the rooms are nasty."¹⁶⁰ The judge sided with TripAdvisor, explaining that "Oregon's media shield law . . . protects any medium of communication" and analogized TripAdvisor's content to other protected communication media such as newspapers and TV stations.¹⁶¹

Just as the courts evaluating the merit of the defamation claims against TripAdvisor took into consideration the context in which the statements were made and the broader social context, the Second Circuit has also looked to the medium by which the statement was disseminated and the audience's expectations of the criticism of a business-related service. In *Mr. Chow of New York v. Ste Jour Azur S.A.*, a French corporation published a restaurant guide called *Gault/Millau Guide to New York*, which contained an unfavorable review about the Chinese restaurant,

153. 728 F.3d 592, 600 (6th Cir. 2013).

154. *See id.* at 600–01.

155. *See id.* at 597–98 (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990) (explaining that the First Amendment protects "statements that cannot reasonably be interpreted as stating actual facts about an individual")).

156. *Id.* 598–99.

157. *See id.* at 599; *see also* *Levinsky's, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 129 (1st Cir. 1997) ("The vaguer a term, or the more meanings it reasonably can convey, the less likely it is to be actionable.").

158. *See Seaton*, 728 F.3d at 601.

159. *See* Aimee Green, *Harsh TripAdvisor reviewer's anonymity is protected: Oregon Coast hotel drops \$74,999 defamation suit*, THE OREGONIAN (Dec. 20, 2014), <https://perma.cc/PZ87-D5LK>.

160. *Id.*

161. *Id.*

Mr. Chow, through a journalist's first-hand dining experience.¹⁶² Although the review was not written anonymously, the analysis from the Second Circuit illuminates the importance of candid restaurant reviews as a matter of public interest.¹⁶³ In its opinion, the Second Circuit stated that "restaurant reviews are the well-recognized home of opinion and comment" and by its very nature, a review "commenting on the quality of a restaurant or its food," much like the review of a business on Yelp or destination on TripAdvisor, "constitutes the opinion of the reviewer."¹⁶⁴ Because a reader of a restaurant review is put on constructive notice that the review represents an opinion based on personal dining experience, the statements received constitutional protection.¹⁶⁵

Similarly, in *Rocker Management LLC v. John Does 1 through 20*, an investment management firm filed a libel suit against fifteen anonymous defendants for statements made on Yahoo's anonymous chat rooms.¹⁶⁶ One of the anonymous posters, "harry3866," posted messages in the chat room stating that Rocker Management "threatens analysts who are bullish on certain stocks," accused the corporation of "spreading lies about those stocks," and mentioned that Rocker Management was at the center of a Securities and Exchange Commission investigation.¹⁶⁷ The anonymous poster then moved to quash the subpoena seeking to unmask his identity.¹⁶⁸

Adhering to a totality of the circumstances approach, the Northern District of California court determined that the anonymous poster's statements, when viewed in the context in which they were made, could only be viewed as "pure opinion" and not defamatory assertions of fact.¹⁶⁹ The chat room where the messages were posted contained warnings reminding readers that the messages were "solely the opinion and responsibility of the poster" and that the opinions "are no substitute for your own research, and should not be relied upon for trading or any other purpose."¹⁷⁰ Additionally, given that the anonymous poster's "free flowing diatribes" were "replete with grammar and spelling errors" and the chat room lacked decorum, Rocker Management failed to demonstrate how and which statements libeled the business.¹⁷¹ As a result, the court determined that the anonymous statements were too vague and hyperbolic to constitute actionable defamation.¹⁷²

162. 759 F.2d 219, 221 (2d Cir. 1985).

163. *See id.* at 228–29.

164. *Id.* at 227–28.

165. *See id.* at 229.

166. *See* 2003 U.S. Dist. LEXIS 16277, at *5 (N.D. Cal. 2003).

167. *Id.* at *2.

168. *See id.* at *1.

169. *See id.* at *3–6.

170. *Id.* at *5.

171. *See id.* at *5–7.

172. *See id.*

3. The Consumer Review Fairness Act and the Future of Candid Business Reviews

In response to an increase in businesses taking steps to “prohibit consumers from sharing their honest opinions about a seller’s goods, services, or conduct” through contractual agreements, legislators began drafting laws to “preserve the credibility and value of online consumer reviews.”¹⁷³ Over the past two years, two different bills were introduced, and ultimately, one of them was signed into law to protect the future of candid online business reviews.

On December 14, 2015, the Senate unanimously approved the Consumer Review Freedom Act.¹⁷⁴ As proposed, the legislation would bar companies from enforcing gag clauses in their Terms of Services, which threaten fines to prevent customers from posting their honest opinion of a business or service.¹⁷⁵ The Act also addressed consumer advocate concerns that such gag clauses effectively stifle free speech and will likely encourage businesses to be more prudent when drafting such agreements in the future.¹⁷⁶ Inspired by the so-called “Yelp Bill,” a California law that makes it unlawful in California to insert any provision into a consumer contract that waives the right to make statements about purchased goods or services, the federal statute similarly aimed to eliminate businesses seeking to intimidate potential reviewers from leaving their honest opinions online.¹⁷⁷

The Act, which was introduced by Republican Senator John Thune of South Dakota, gained bipartisan support once the Act was amended to clarify that website operators could still include contract provisions reserving their right to remove unlawful, false, or misleading content.¹⁷⁸ Senior Democratic Senator Brian Schatz of Hawaii and others supporting the legislation believed that “[o]nline reviews help consumers make better choices” and that each consumer should not be prohibited from providing their feedback, even if that feedback is negative.¹⁷⁹

On September 12, 2016, the House of Representatives also unanimously passed a bill that was nearly identical in substance and in name to the one passed by the Senate.¹⁸⁰ The Consumer Review Fairness Act will “protect[] consumers posting

173. Jim Rosenfeld & Diana Palacios, *Protecting the Right to Complain: The Consumer Review Fairness Act of 2016*, DAVIS WRIGHT TREMAINE LLP (Dec. 20, 2016), <https://perma.cc/H342-JWW8>.

174. S. 2044, 114th Cong. (2015).

175. A number of businesses insert gag clause provisions into contracts and terms of services for both customers and prospective customers declaring that if the customer writes or says anything negative about the good, service, or conduct, the company can seek damages. Gag clauses have caused tension between ISPs and customers who want to be able to write candid business reviews and the businesses that want to protect their names. See generally Chris Morran, *House Passes Bill Outlawing “Gag Clauses” That Try To Punish Customers For Writing Negative Reviews*, THE CONSUMERIST (Sept. 12, 2016), <https://perma.cc/K8FN-AWFL>.

176. See Kimberly Chow, *Consumer Review Freedom Act of 2015 Wins Support of Every Senator*, TECH. L. DISPATCH (Dec. 23, 2015), <https://perma.cc/3SVY-9LRW>.

177. See Jacob Gershman, *New California Law Bans Companies from Punishing Negative Online Reviewers*, THE WALL ST. J. L. BLOG (Sept. 12, 2014), <https://perma.cc/9J2W-66EB>.

178. See *id.*

179. Mario Trujillo, *Senate approves bill protecting negative online reviews*, THE HILL (Dec. 15, 2015), <https://perma.cc/9X55-HPUQ>.

180. Consumer Review Fairness Act of 2016, H.R. 5111, 114th Congress (2016).

honest feedback online.”¹⁸¹ Because of the growing consensus that too many companies are “burying non-disparagement clauses in fine print and going after consumers when they post negative feedback online,” President Obama ultimately signed the Consumer Review Fairness Act into law on December 14, 2016.¹⁸² With the passage of the Consumer Review Fairness Act, it is now illegal for businesses to use contract provisions to stifle negative user reviews and also is illegal for companies to impose penalties or fees against a customer who posts a negative business review.¹⁸³ Now that business reviewers are free to express their opinions of the businesses they frequent online, this Act should result in a more complete and reliable collection of information for consumers.¹⁸⁴

C. DRAWING A LINE BETWEEN COMMERCIAL SPEECH AND BUSINESS REVIEWS CONCERNING COMMERCIAL PRODUCTS AND SERVICES

The level of protection given to anonymous online reviews of businesses and consumer goods and services often depends on whether the speech is commercial or non-commercial speech. The distinction is relevant because commercial speech has consistently received less constitutional protection than more valuable forms of speech such as political, religious, or pure opinionated speech.¹⁸⁵

In *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, the Supreme Court defined commercial speech as “expression related solely to the economic interests of the speaker and its audience.”¹⁸⁶ The majority opinion noted that there should be a difference between “speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.”¹⁸⁷ Because the Court recognized a limitation on free speech depending on whether the speech is classified as commercial or non-commercial, the concurring opinion argued that “it is important that the commercial speech concept not be defined too broadly lest speech deserving of greater constitutional protection be inadvertently suppressed.”¹⁸⁸

But just because speech is critical of a business-related activity does not mean that the speech will be enjoined.¹⁸⁹ The Supreme Court explained in *Bose*

181. Susmita Baral, *House Passes Bill Protecting Consumers from Gag Orders Over Negative Reviews*, INT’L BUS. TIMES (Sept. 13, 2016), <http://www.ibtimes.com/house-passes-bill-protecting-consumers-gag-orders-over-negative-reviews-2415564> (quoting Congressman Leonard Lance of NJ).

182. Consumer Review Fairness Act of 2016, H.R. 5111, 114th Congress (2016).

183. Christopher Elliott, *A pending bill would prohibit negative TripAdvisor and Yelp reviews*, WASH. POST (Sept. 22, 2016), <https://perma.cc/RP5S-SGTX> (quoting Joe Sullivan, an attorney who consults with companies to determine how to respond to user-generated reviews).

184. *Id.*

185. See *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456–57 (1978).

186. 447 U.S. 557, 561 (1980).

187. *Id.* at 562 (quoting *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456–57 (1978)).

188. *Id.* at 579.

189. See *CPC Int’l, Inc. v. Skippy, Inc.*, 214 F.3d 456, 462 (4th Cir. 2000) (quoting *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 33 (1st Cir. 1987) (explaining that if a business owner could prevent negative or offensive commentary, then the business owner would effectively shield itself from criticism)).

Corporation v. Consumers Union of United States, Inc., that the First Amendment protects publishing opinions and criticisms about a business-related product offered to the public.¹⁹⁰ In *Bose*, a stereo loudspeaker manufacturer brought suit against a magazine publisher, *Consumer Reports*, for its word choice in an article evaluating the quality of numerous brands of loudspeaker systems.¹⁹¹ In the business review, *Consumer Reports* described the Bose speaker system as one that “seemed to grow to gigantic proportions and tended to wander about the room.”¹⁹² The Court held that as a matter of law, the record failed to present clear and convincing evidence that *Consumer Reports* or its employee published the article “with knowledge that it was false or with reckless disregard of whether it was false or not.”¹⁹³ As a matter of public policy, the concurrence explained that the statement in issue in this case “is the sort of inaccuracy that is commonplace in the forum of robust debate” and “erroneous statements [are] inevitable in free debate, and . . . must be protected.”¹⁹⁴

III. EXTENDING FIRST AMENDMENT PROTECTION TO ANONYMOUS ONLINE BUSINESS REVIEWS

A. APPLYING THE TOTALITY OF THE CIRCUMSTANCES TEST BEFORE UNMASKING AUTHORS OF ANONYMOUS ONLINE BUSINESS REVIEWS

While both state and federal courts are divided in their methodology for determining which unmasking standard should apply when deciding whether to enforce subpoenas against anonymous online business reviewers, circuit courts have consistently extended constitutional protection to allegedly defamatory criticism through an examination of the totality of the circumstances.¹⁹⁵ Nine circuit courts have embraced the *Ollman v. Evans* court’s articulation for totality of the circumstances, which has courts weighing the common usage of the language, the statement’s verifiability, the full context of the statement, and the broader setting in which the statement appears.¹⁹⁶ Despite the overwhelming support for employing the totality of the circumstances test in named defamation cases, the test is noticeably absent in cases dealing with anonymous online business reviews and critiques. Instead courts have created a “convoluted matrix” of sorts, whereby the jurisdiction in which an allegedly defamed plaintiff files suit will largely determine which standard for unmasking an anonymous poster the court will use.¹⁹⁷

190. 466 U.S. 485, 513 (1984).

191. *See id.* at 487–88.

192. *Id.* at 488.

193. *Id.* at 492.

194. *Id.* at 513 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964) (explaining that the publication was not a “commercial” advertisement because it merely “communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern”).

195. *See Ollman v. Evans*, 750 F.2d 970, 979 (D.C. Cir. 1984).

196. *See Milkovich v. Loraine Journal Co.*, 497 U.S. 1, 8–9 (1990) (citing *Ollman*, 750 F.2d at 979).

197. Nickerson, *supra* note 70, at 845.

Currently the majority of courts rely on the prima facie balancing test from *Dendrite* or the summary judgment test from *Cahill*, with many courts even using a hybrid of the two.¹⁹⁸ While the good faith standard is far less common, it still holds a place in the conversation, most recently in the *Yelp, Inc. v. Hadeed Carpet Cleaning* case.¹⁹⁹

However, the solution to the fractured nature of the judicial response to unmasking the authors of allegedly defamatory business reviews is not necessarily uniformity. Since a judicial determination of defamation is inherently a fact-intensive process, where courts regularly take into consideration the totality of the circumstances, the pre-trial stages of a defamation lawsuit should be subject to the same fact-intensive inquiry.²⁰⁰ This Section will argue that an anonymous business review posted on a business-reviewing forum such as Yelp and TripAdvisor should be subjected to a fact-intensive inquiry like the totality of the circumstances test before a court can determine whether or not to unmask the anonymous defendant.

Regardless of the motivation—to educate, to express an unpopular view, or to hide one’s identity for fear of retaliation—the interest in encouraging anonymous beliefs to enter the marketplace of ideas “unquestionably outweighs any public interest in requiring disclosure as a condition of entry.”²⁰¹ Because the good faith standard is the most lenient for plaintiffs to meet the standard is “more likely to be misused for harassing and intimidating critics,” and therefore, should be abandoned.²⁰² The good faith standard clearly lacks the necessary protection usually afforded to defendants to express their first-hand experiences because, in the cases that applied the good faith standard, both ISPs (*AOL* and *Yelp*) lost in their motions to quash the subpoenas, whereas both the *Dendrite* and *Cahill* courts held in favor of them.²⁰³ Consequently, the good faith standard as articulated by *AOL* and as applied in *Yelp* is too low a threshold because it merely requires that plaintiffs make a complaint of alleged defamation with good faith that such a complaint is valid.²⁰⁴ Since free speech has historically been governed by exacting scrutiny, the good faith standard is neither in agreement with Supreme Court precedent nor the nation’s commitment to maintaining an “uninhibited, robust, and

198. See *Indep. Newspapers v. Brodie*, 966 A.2d 432, 456 (Md. 2009) (applying *Dendrite* standard); see also *Krinsky v. Doe 6*, 159 Cal. App. 4th 1154, 1170 (6th Cir. 2008) (adopting a hybrid of *Dendrite* and *Cahill*); *Mobilisa, Inc. v. Doe*, 170 P.3d 712, 721 (Ariz. Ct. App. 2007) (adopting a hybrid of *Dendrite* and *Cahill*).

199. 752 S.E.2d 554, 563 (Va. Ct. App. 2014), *rev’d on other grounds*, 770 S.E.2d 440 (2015).

200. See *Milkovich v. Loraine Journal Co.*, 497 U.S. 1, 8 (1990) (citing *Ollman*, 750 F.2d at 979).

201. See *Dendrite Int’l, Inc. v. Doe No. 3*, 775 A.2d 756, 765 (N.J. Super. Ct. App. Div. 2001) (citing *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 341–42 (1995)).

202. Kaminski, *supra* note 14, at 851 (standing for the argument that the good faith threshold permits abuse in the hands of a litigious plaintiff).

203. See *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 752 S.E.2d 554, 567 (Va. Ct. App. 2014), *rev’d on other grounds*, 770 S.E.2d 440 (2015); *In re Subpoena Duces Tecum to America Online, Inc.*, 52 Va. Cir. 26 (2000), *rev’d on other grounds*, 261 Va. 350 (2001).

204. See *Doe v. Cahill*, 884 A.2d 451, 457 (Del. 2005) (explaining that plaintiffs can initially plead sufficient facts to meet good faith “even if the defamation claim is not very strong, or worse, if they do not intend to pursue the defamation action to a final decision”).

wide-open debate” in order to encourage the free exchange of ideas in the marketplace.²⁰⁵

While both *Dendrite* and *Cahill* more adequately protect the First Amendment interests of the author of an anonymous business review, both tests fail to adequately protect the interests of the readers to hear unpopular and often marginalized criticism. The *Dendrite* court’s holding is significant for acknowledging the importance of requiring a case-by-case analysis.²⁰⁶ It was important to the New Jersey court to strike a balance between the First Amendment right to speak anonymously and the right of the plaintiff “to protect its proprietary interests and reputation.”²⁰⁷ The *Dendrite* five-factor test requires that the plaintiff provide notice and opportunity to the defendant, an explanation of the exact statements the plaintiff believes to be actionable defamation, sufficient evidence supporting each element of the cause of action on a prima facie basis, and then the court will balance the competing interests.²⁰⁸ Although balancing is an important element to consider in the face of defamation allegations, it is not helpful to require a balancing test when the court fails to detail with specificity the precise elements that must be balanced.²⁰⁹ The *Dendrite* test is flawed because it fails to mention the importance of the totality of the circumstances test in the context of anonymous online defamation. In order to remedy this unsound judgment, courts should weigh the common usage of the language, the statement’s verifiability, the full context of the statement, and the broader setting in which the statement appears before guaranteeing First Amendment protection.²¹⁰

The acceptance and rejection of the balancing element is one of the driving forces behind the current confusion and divergence of standards for unmasking an anonymous poster. For instance, the *Cahill* court believed that the *Dendrite* court’s application of balancing “needlessly complicates the analysis.”²¹¹ Concerned with judicial efficiency, the *Cahill* court developed a truncated version of the *Dendrite* test, which takes into consideration the notice and opportunity elements of *Dendrite* while also adding a summary judgment element.²¹² By adopting a summary judgment standard, the *Cahill* court understood it would be needlessly repetitious to balance the interests of both parties.²¹³ However, this Note argues that rejecting the need for a separate balancing element is flawed because balancing helps the court to consider each case holistically with a flexible, fact-specific inquiry.

205. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (articulating that the nation’s profound commitment to maintaining an “uninhibited, robust, and wide-open debate” will outweigh the potential for unfavorable opinions and criticisms).

206. *Dendrite Int’l, Inc. v. Doe No. 3*, 775 A.2d 756, 761 (N.J. Super. Ct. App. Div. 2001).

207. *Id.* at 760.

208. See *id.* at 760–61.

209. See *id.* at 760 (articulating that the courts must “strike a balance between the well-established First Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interests and reputation”).

210. See *Ollman v. Evans*, 750 F.2d 970, 979 (D.C. Cir. 1984).

211. *Doe v. Cahill*, 884 A.2d 451, 461 (Del. 2005).

212. See *id.* at 457.

213. See *id.* at 461.

Incorporating the totality of the circumstances test is not a novel concept; in fact the *Cahill* court relied on similar reasoning in holding in favor of the defendant.²¹⁴ In the *Cahill* opinion, the court referred to the published statements as “typographical error,” while noting that a reasonable reader was put on notice that what he or she was reading was merely an opinion published on a forum “dedicated to opinions about issues in Smyrna.”²¹⁵ Moreover, the court explained that it is important to consider “both the immediate context and broader social context,” which is precisely the type of inquiry a totality of the circumstances analysis would consider.²¹⁶ Although the court outwardly rejected a totality of the circumstances approach it then functionally applied one.

Anonymous online business reviews should be viewed in context of the entire published statement, paying close attention to figurative rhetoric and opinion, without isolating any one particular phrase or sentence. When an anonymous consumer resorts to a forum such as Yelp or TripAdvisor to detail his or her first-hand business experience, the courts should incorporate an examination of the type and nature of the language used as part of the *Dendrite* balancing framework. If the language is loose, figurative, or hyperbolic rather than precise or literal, then the language is more likely to be un-actionable opinion.²¹⁷ The First Amendment has long protected opinion from defamation claims, as this is the type of language a democratic society needs to encourage a “robust and uninhibited” exchange of ideas in the marketplace.²¹⁸ Even if the business review incorporates negative feedback or an inflated first-hand business experience, the review should receive First Amendment protection and the plaintiff should not be able to unmask the anonymous poster. Moreover, when cautionary language is incorporated into the review or prominently displayed on the social-networking site, the anonymous speaker has put the reader on constructive notice to determine for himself or herself whether this business is one they would endorse.²¹⁹

Additionally, an anonymous online business review cannot be deemed defamatory before a court considers the medium by which the statement was disseminated and the audience to which it was published. Readers usually seek out business reviews on social-networking sites for opinions to help them evaluate future business expenditures. Like in *Mr. Chow*, where the court explained that restaurant reviews are well established as the home for “pointed commentaries,” Yelp users read online reviews for a critical overview of the writer’s personal

214. See *id.* at 463 (“The judge will have before him the allegedly defamatory statements and can determine whether they are defamatory based on the words and the context in which they were published.”).

215. See *id.* at 467.

216. See *supra* note 118 and accompanying text.

217. See *Seaton v. TripAdvisor*, 728 F.3d 592, 600 (6th Cir. 2013) (claiming that the hotel was the “dirtiest” could only be interpreted as a hyperbolic opinion).

218. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

219. See *Doe v. Cahill*, 884 A.2d 451, 467 (Del. 2005) (explaining that the cautionary language identifying the blog as a forum “dedicated to opinions about issues in Smyrna” ensures that no reasonable reader could have interpreted the anonymous statements as anything other than opinion).

observations and experiences.²²⁰ Yelp, much like TripAdvisor is a forum that encourages unfiltered commentary, and readers are put on constructive notice that the tone, language, and implications of a review may similarly make a review one-sided. Although two individuals may differ regarding the same business experience, it would be unconscionable to allow a business to filter unfavorable comments at the expense of First Amendment protection.

While the *Dendrite* test should still be considered a leading test for its incorporation of a balancing test, courts presented with subpoenas from allegedly defamed plaintiffs seeking to unmask an anonymous defendant should consider the totality of the circumstances before requiring the defendant to be unmasked. Without such considerations for the language and forum used by the anonymous poster, there will be an increase in viewpoint discrimination and a chilling effect of critical speech in the marketplace.

However, this argument should not be misconstrued as suggesting that employing a totality of the circumstances test would necessarily yield a different judicial decision for free speech online than the *Cahill* or *Dendrite* tests. Instead, the totality of the circumstances analysis is needed not because it would be outcome determinative, but rather, because having a detailed fact-finding record of the broad and narrow context of each business review would help ISPs create better user guidelines and greater predictability for anonymous business reviewers moving forward.

B. ANONYMOUS ONLINE BUSINESS REVIEWS WRITTEN BY CUSTOMERS OF THE BUSINESS ARE NOT COMMERCIAL SPEECH AND ARE THEREFORE ENTITLED TO HEIGHTENED CONSTITUTIONAL PROTECTION

Anonymous criticism of a business or commercial product or service is not commercial speech even if the review may harm the plaintiff's business interests. So long as the review is not written with the intent of making a profit and is not commercial in nature, business reviews are generally excluded from the ambit of commercial speech. The First Amendment extends protection to anonymous speech expressing an opinion or criticism as long as the statement cannot be provably false.²²¹ This argument will reason that when an anonymous online business review complies with the terms of service and/or content guidelines it will likely be classified as non-commercial speech. Therefore, because non-commercial speech receives greater protection than commercial speech, an anonymous business review should be afforded heightened constitutional protection.²²²

220. *Mr. Chow of N.Y. v. Ste Jour Azur S.A.*, 759 F.2d 219, 227 (2d Cir. 1985) (recognizing that reviews are the home of opinion).

221. *See FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978) (reasoning that simply because society may find the speech offensive is not a sufficient reason for suppressing it).

222. *See Helen Norton, Setting the Tipping Point for Disclosing the Identity of Anonymous Online Speakers: Lessons from Other Disclosure Contexts*, 49 WAKE FOREST L. REV. 565, 571 (2014) (explaining that courts apply less stringent scrutiny to commercial speech).

An anonymous business reviewer should not be stifled from expressing a first-hand business experience so long as that consumer was actually a customer of the business and is not maliciously writing the review to harm the business. It would also be a great challenge for an aggrieved businessperson to demonstrate falsity when the business reviewer was also a customer of their business. Anonymous business reviews should not be categorized as the lesser-protected commercial speech because while the reviews often do critique a commercial transaction and business experience, an opinion or criticism about a business-related product does not necessarily derive economic value to the critic.²²³ Moreover, a published opinion on a social-networking site which holds itself out as a business reviewing platform is merely intended to “communicate information, express an opinion, recite grievances, and protest claims of abuses” in the marketplace.²²⁴ For instance, in order to write a business review, Yelp’s Terms of Service and Content Guidelines require that a consumer’s review “be unbiased and objective” and prohibits consumers from posting “promotional content” in order to prevent the site from becoming “overrun with commercial noise.”²²⁵ These safeguards adequately ensure that in order to use the website, business reviewers must not engage in speech aimed to generate revenue for a business or seek to profit from the reviews they write.²²⁶ Only if a business review is an “expression related solely to the economic interests of the speaker and its audience” can the speech be properly classified as commercial speech.²²⁷ Otherwise, even a negative opinion about a commercial activity should be protected under the First Amendment.²²⁸

As a matter of public policy, and in order to promote the exchange of ideas in the marketplace, a consumer has the constitutional right to openly critique and express opinion regarding his own business experience. Analogous to *New York Times*, where the Supreme Court recognized that expressing a grievance, even if unpopular, deserves constitutional protection, an anonymous business reviewer should not be forced to retract his or her review simply because it is unpopular.²²⁹ Besides, requiring businesses to remain accountable would likely improve the critiqued business by encouraging a change that may be more satisfactory to consumers. Just as the *Seaton* court alluded to the importance of the free exchange of ideas for online consumer reviewing platforms, without such a freedom, users would likely begin to self-censor their commentary, leading to the punishment of conjecture and expressive thought at the expense of a business’s reputation.

Furthermore, the recent enactment of the Consumer Review Fairness Act into law illustrates the level of clout that President Obama and Congress believe should

223. See *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 513 (1984).

224. *NAACP v. Button*, 371 U.S. 415, 435 (1963).

225. *General Guidelines*, YELP CONTENT GUIDELINES, <https://perma.cc/V5QY-RH3G> (last visited Feb. 10, 2017).

226. See *id.*

227. *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 561 (1980).

228. See *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978).

229. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964).

be accorded to consumers reviewing first-hand business experiences.²³⁰ As passed, the Act seeks to protect the First Amendment rights of business consumers as they provide their own personal opinions about a business they have frequented.²³¹ Business reviews are an important form of speech worth protecting because they “can reveal problems and defects with products, warn potential consumers of a product or service’s risks, and in some cases, even lead companies to remedy the problem and do right by the consumer.”²³² Without adequate protection for business reviews, businesses and powerful companies will likely continue to threaten the rights of consumers who speak out on matters of public interest.²³³

IV. CONCLUSION

The importance of candid business reviews to the future of anonymous speech online cannot be overstated. Where and how consumers spend their money is an important decision with ramifications not limited to First Amendment claims.²³⁴ As consumers begin spending more time making purchases online and less time in actual stores and shopping malls, it is crucial that these consumers can contribute to the marketplace based on their first-hand business experiences.

Denying consumers the freedom to express their thoughts and opinions anonymously about a business experience or purchase of goods or services would not only be a disservice to the strong precedents the First Amendment has long garnered, but would also degrade the quality of business experiences and the products available in the market. Helpful criticism promotes change and creativity in the marketplace.²³⁵ Allowing too low a threshold for unmasking anonymous online business reviews will only encourage meritless claims of defamation with the intent to intimidate and stifle the opinion of a dissatisfied consumer.²³⁶

It is worthwhile to mention that there is a tendency to belittle business reviews as unhelpful tirades or lavish praise for a business experience. While its true that generally the happiest and also least satisfied consumers gravitate to these forums, business reviews are nothing if not narratives.²³⁷ They burst with details, including the celebration of life milestones like birthdays at restaurants to weddings and

230. See Elliot Harmon, *President Signs Law Protecting Your Right to Review*, ELEC. FRONTIER FOUND. (Dec. 21, 2016), <https://perma.cc/9H4Y-583H>.

231. *Id.*

232. Lively, *supra* note 74, at 707.

233. See Laurent Crenshaw, *Freedom of Speech Deserves Better Federal Protection*, YELP OFFICIAL BLOG (May 15, 2015), <https://perma.cc/58KD-9J56>.

234. See Kaitlin A. Dohse, *Fabricating Feedback: Blurring the Line Between Brand Management and Bogus Reviews*, 13 U. ILL. J.L. TECH & POL’Y 363, 368 (2013) (reasoning that where and how consumers spend their money and time also impacts business revenue and other consumer industries).

235. See *id.* at 368 (explaining that consumer-generated Yelp reviews create a higher bump in popularity and can drive consumer demand).

236. Norton, *supra* note 222, at 579 (“The more courts are concerned about chilling—and their concern often varies with the nature of the speech at issue—the more they should demand of the plaintiff before concluding that the benefits of disclosure outweigh their expressive costs.”).

237. Tom Vanderbilt, *Inside the Mad, Mad World of TripAdvisor*, OUTSIDE (Mar. 13, 2015), <https://perma.cc/YZCF-KPY2>.

honeymoons at hotels.²³⁸ Business reviews are forms of literature, they are thought provoking, self-expressive, and should be viewed in the same vein as other more classic First Amendment jurisprudence like novels, films, and plays.

Yelp and TripAdvisor are unique forums in that they do not hold themselves out to provide editorial oversight or use extensive fact-checking.²³⁹ Viewers seek out these platforms not under the pretense that everything they read is verifiable fact; rather, consumers by and large seek out these forums to receive a candid overview of a restaurant experience, a travel destination, or the newest technology on the market. These websites are known for encouraging buyers to discuss what they liked and disliked about local businesses, and do not exist to regurgitate what readers could already learn from the business's public relations campaign. Under a totality of the circumstances review, courts should take into consideration that these business-reviewing forums generally do not employ layers of editorial oversight. The level of accountability attributable to these forums should not be equivalent to that of newspapers and books, which undergo many rounds of edits before publication. If business reviews, newspapers, and books were all accorded the same editorial clout, this would not only diminish the significance of taking into consideration the totality of the circumstances in the first place, but would also lead to a change in the way business reviewing platforms conduct their operations and stifle consumers from providing anonymous advice online.

The spectrum of reliability for online commentary continues to evolve as the savviness of consumers' progresses with it.²⁴⁰ In the context of defamation, false is false and publication is publication. But, in the context of online business reviews, the ability to cause damage is where online business reviews truly diverge from offline criticisms.²⁴¹ With the ever-increasing volume of online business criticisms and simultaneous expansion of reviewing portals, coupled with the reliability spectrum and increasing savviness of consumers, can one Yelp review really hurt anyone? Or at least to the level we thought it could previously? It seems more than plausible that a single online business review is far less damaging than one would have been years ago. Additionally, with the ability to sift through content with ease, consumers can more readily distinguish accurate from inaccurate online business reviews. So, why not give them the opportunity to do so?

Although the right to write about one's business experiences is a significant one, courts should not overlook the potential for misuse. Because anonymous business reviewers could use their anonymity as a cloak from defamation claims, this Note concludes that courts should exhibit prudence when considering the context of the speech, word choice of the author, and debate whether or not the speech is commercial or non-commercial before unmasking an anonymous business reviewer's identity. Additionally, as the Internet continues to evolve and progress, courts should continue to revisit the spectrum of reliability and take into consideration the ability of consumers to decipher a helpful from an unhelpful

238. *Id.*

239. See Shepard & Belmas, *supra* note 6, at 97.

240. See *Doe v. Cahill*, 884 A.2d 451, 465 (Del. 2005).

241. Special thanks to Adjunct Professor Hillel Parness for the development of this idea.

anonymous business review. The First Amendment clearly states “Congress shall make no law . . . abridging the freedom of speech, or of the press”²⁴² It does not say that a law can abridge the freedom of speech when that speech is uttered in the context of online business reviews.²⁴³ Precedent illustrates that the Supreme Court has continued to preserve and protect the right to speak anonymously, which should continue to include the right to write anonymous business reviews online.

242. U.S. CONST. amend. I.

243. *Id.*