

New York Supreme Court

Appellate Division – Second Department

ROBERT F. KENNEDY, JR.,

Petitioner-Respondent,

Docket Nos.:
2021-03700 &
2021-04476

– against –

KOS MEDIA, LLC d/b/a DAILY KOS,

Respondent-Appellant.

**NOTICE OF MOTION OF THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS AND ELEVEN MEDIA
ORGANIZATIONS FOR LEAVE TO FILE AMICUS BRIEF IN
SUPPORT OF RESPONDENT-APPELLANT**

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Westchester County Clerk's Index No. 65319/2020

PLEASE TAKE NOTICE that upon the annexed affirmation of Christine N. Walz dated December 22, 2021, and all exhibits attached thereto, including a copy of the proposed brief of amici curiae, The Reporters Committee for Freedom of the Press and eleven media organizations (collectively, “amici”) will move this Court, located at 45 Monroe Place, Brooklyn, New York 11201, on December 22, 2021 at 10:00 a.m. or as soon thereafter as counsel may be heard, for an order granting amici leave to file the brief attached hereto as amici curiae in support of respondent-appellant in the above-captioned action and for such other and further relief as the court may deem just and proper under the circumstances.

Dated: December 22, 2021
New York, NY

by:



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**AFFIRMATION OF CHRISTINE N. WALZ
IN SUPPORT OF MOTION OF THE
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
AND ELEVEN MEDIA ORGANIZATIONS FOR LEAVE TO
FILE AMICUS BRIEF IN SUPPORT OF RESPONDENT-
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Christine N. Walz, an attorney duly admitted to practice before the courts of the State of New York, and not a party to this action, hereby affirms the following to be true under penalty of perjury pursuant to CPLR § 2106:

1. I am a partner with Holland & Knight, located at 31 West 52nd Street, New York, NY 10019 and am counsel of record for the Reporters Committee for Freedom of the Press (the “Reporters Committee”), The E.W. Scripps Company, First Amendment Coalition, The Media Institute, MediaNews Group, New York News Publishers Association, New York Public Radio, The New York Times Company, Online News Association, Radio Television Digital News Association, Society of Professional Journalists, and the Tully Center for Free Speech (collectively, “amici”) in the above-captioned action. I submit this affirmation in support of amici’s motion for leave to file a brief as amicus curiae in support of respondent-appellant in the above-captioned action.

2. Attached hereto as **Exhibit A** is a true and correct copy of the brief that amici seek leave to file as amici curiae.

3. Attached hereto as **Exhibit B** is a true and correct copy of the Decision and Order from the Supreme Court, County of Westchester, dated April 16, 2021, from which respondent-appellant appeals.

4. Attached hereto as [Exhibit C](#) is a true and correct copy of the notice of appeal, dated May 4, 2021, invoking this Court’s jurisdiction.

5. Lead amicus, the Reporters Committee for Freedom of the Press (the “Reporters Committee”), is an unincorporated nonprofit association. Founded by leading journalists and media lawyers in 1970 when the nation’s news media faced an unprecedented wave of government subpoenas seeking to reveal the identities of confidential news sources, the Reporters Committee works to protect First Amendment freedoms and the newsgathering rights of journalists. The Reporters Committee frequently serves as amicus curiae in cases that concern issues of importance to journalists and news media, including litigation involving claims of defamation. *See, e.g.*, Brief for the Reporters Committee for Freedom of the Press and 20 Media Organizations as Amici Curiae Supporting Defendants-Respondents, *Rainbow v. WPIX, Inc.*, 117 N.Y.S.3d 51 (1st Dep’t 2020) (Index No. 152477/15), available at <https://perma.cc/5S3H-SLT7>; Brief for the Reporters Committee for Freedom of the Press and 30 Media Organizations as Amici Curiae Supporting Defendants-Appellants, *Desmond v. News & Observer Publ’n Co.*, 826 S.E.2d 454 (Mem.) (N.C. May 1, 2019) (No. 132PA18-2), available at <https://perma.cc/EN3R-4YQL>.

6. Additional proposed amici curiae are prominent news publishers and professional and trade groups.¹ As news organizations and entities that advocate for the First Amendment rights of the public and the press, amici seek to ensure that the right to anonymous free speech on the Internet is not chilled by dissatisfied public figures wielding libel suits.

7. Amici are well-suited to provide a unique industry-wide perspective not currently represented by respondent-appellant on the importance of adopting a stringent requirement for identifying anonymous online speakers. Amici or their members frequently host content published under a pseudonym, such as readers' comments and posts. Amici have a strong interest in ensuring that their ability to host this content and protect its authors' anonymity is not hindered, if not wholly eviscerated, by the Supreme Court's decision in this case.

8. Respondent-appellant's and petitioner-respondent's counsel have been notified of this motion. Respondent-appellant's counsel consents; petitioner-respondent's counsel takes no position.

¹ A comprehensive list of amici is annexed hereto as Appendix A.

WHEREFORE, I respectfully request that this Court grant amici's motion for leave to file a brief as amici curiae in support of respondent-appellant, a copy of which is attached hereto as **Exhibit A**.

Dated: December 22, 2021
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APPENDIX A: DESCRIPTION OF ADDITIONAL AMICI CURIAE

The E.W. Scripps Company is the nation's fourth-largest local TV broadcaster, operating a portfolio of 61 stations in 41 markets. Scripps also owns Scripps Networks, which reaches nearly every American through the national news outlets Court TV and Newsy and popular entertainment brands ION, Bounce, Grit, Laff, and Court TV Mystery. The company also runs an award-winning investigative reporting newsroom in Washington, D.C., and is the longtime steward of the Scripps National Spelling Bee.

First Amendment Coalition is a nonprofit public interest organization dedicated to defending free speech, free press and open government rights in order to make government, at all levels, more accountable to the people. The Coalition's mission assumes that government transparency and an informed electorate are essential to a self-governing democracy. To that end, we resist excessive government secrecy (while recognizing the need to protect legitimate state secrets) and censorship of all kinds.

The Media Institute is a nonprofit foundation specializing in communications policy issues founded in 1979. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry,

and excellence in journalism. Its program agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

MediaNews Group is a leader in local, multi-platform news and information, distinguished by its award-winning original content and high-quality local media. It is one of the largest news organizations in the United States, with print and online publications across the country.

The New York News Publishers Association is a trade association which represents daily, weekly, and online newspapers throughout New York State. It was formed in 1927 to advance the freedom of the press and to represent the interests of the newspaper industry.

With an urban vibrancy and a global perspective, **New York Public Radio** produces innovative public radio programs, podcasts, and live events that touch a passionate community of 23.4 million people monthly on air, online, and in person. From its state-of-the-art studios in New York City, NYPR is reshaping radio for a new generation of listeners with groundbreaking, award-winning programs including Radiolab, On the Media, The Takeaway, and Carnegie Hall Live, among many others. New York Public Radio includes WNYC, WQXR, WNYC Studios, Gothamist, The Jerome L. Greene Performance Space, and New Jersey Public

Radio. Further information about programs, podcasts, and stations may be found at www.nypublicradio.org.

The New York Times Company is the publisher of *The New York Times* and *The International New York Times*, and operates the news website nytimes.com.

The Online News Association is the world's largest association of digital journalists. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. Membership includes journalists, technologists, executives, academics, and students who produce news for and support digital delivery systems. ONA also hosts the annual Online News Association conference and administers the Online Journalism Awards.

Radio Television Digital News Association (“RTDNA”) is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

Society of Professional Journalists (“SPJ”) is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and

stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

The Tully Center for Free Speech began in Fall 2006 at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

EXHIBIT A

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae (“amici”) are the Reporters Committee for Freedom of the Press (“Reporters Committee”), The E.W. Scripps Company, First Amendment Coalition, The Media Institute, MediaNews Group, New York News Publishers Association, New York Public Radio, The New York Times Company, Online News Association, Radio Television Digital News Association, Society of Professional Journalists, and the Tully Center for Free Speech. Lead amicus the Reporters Committee is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970 when the nation’s news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. Other amici are prominent news publishers and professional and trade groups. A supplemental statement of the identity and interest of the amici is included as Appendix A.¹

Amici are dedicated to defending the First Amendment rights of journalists and news organizations throughout the United States, including in New York. Amici include organizations that provide platforms for anonymous authors to comment on

¹ No counsel for a party authored this brief in whole or part, nor did any person or entity, other than amici or their counsel, contribute money toward preparing or submitting this brief.

and post content. Amici thus have a strong interest in ensuring that New York courts apply a standard for pre-suit disclosure of anonymous online speakers' identities that appropriately accounts for the First Amendment interests in such speech.

STATEMENT OF FACTS AND PROCEEDINGS

Daily Kos is a digital media platform operated by respondent-appellant Kos Media, LLC that hosts news articles and community discussions about public affairs. R. 90 ¶¶ 1–3.² Daily Kos features “front page” diaries written by staff and “community diaries” written by registered users, which Daily Kos does not review or alter before publication. R. 91 ¶¶ 5, 7. Readers can comment on both types of diaries. *Id.* ¶ 8. Community diaries and comments may be posted pseudonymously, and Daily Kos protects posters' anonymity by banning users who attempt to reveal identities. R. 91–92 ¶¶ 9–10.

On August 29, 2020, a user with the pseudonym “DowneastDem” posted a community diary headlined “Anti-Vaxxer RFK JR. joins neo-Nazis in massive Berlin ‘Anti-Corona’ Protest.” R. 81. It read:

Tens of thousands ‘Corona-Truthers’ descended on Berlin today to protest the measures implemented by Angela Merkel and her government to prevent the coronavirus spread. . . . The protest was organized by right-wing extremist organizations including the AfD party and various anti-Semitic conspiracy groups as well as the neo-Nazi NPD party.

² All citations are to the Appellate Record (“R.”) or Docket (“Dkt.”).

Among the speakers was Robert F. Kennedy Jr., who warned against the ‘totalitarianism’ of Angela Merkel.

He sounded the alarm concerning the 5G mobile network and Microsoft founder Bill Gates. Referring to the famous Berlin speech of his uncle JFK he said ‘Today Berlin is is [sic] once again the front against totalitarianism.’

Protester[s] were seen carrying poster [sic] urging ‘Trump, Please Help’ with the QAnon logo.

R. 81.

DowneastDem’s post was drawn from an article published by the German newspaper Der Tagesspiegel, linked to in the underlined text. *See* R. 82–87, 164. U.S.-based media also reported on the protest and the involvement of Robert F. Kennedy (“Kennedy”). R. 117–24, 133–40, 165–68.

On November 30, 2020, Kennedy filed a petition in Westchester County Supreme Court seeking a subpoena compelling Daily Kos to reveal DowneastDem’s identity pursuant to CPLR 3102(c) so that he could bring a defamation claim against DowneastDem. R. 52–55, 57–60. The court granted Kennedy’s petition because “the petitioner has alleged facts fairly indicating that he . . . has some cause of action,” and denied as moot the parties’ other motions, including Daily Kos’s motions for a protective order and stay. R. 3–6. Daily Kos appealed. R. 1, 13.

Amici write to address Daily Kos’s Questions Involved 1 through 3, regarding the proper standard for pre-suit disclosure under CPLR 3102(c).

ARGUMENT

When addressing a motion seeking pre-suit disclosure of an anonymous online speaker's identity, this Court should adopt the five-factor standard set forth in *Dendrite International, Inc. v. Doe No. 3*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001), which appropriately balances the First Amendment's protections for anonymous speech against the petitioner's interest in disclosure. Alternatively, amici urge the Court to adopt the approach of the other Appellate Divisions, which requires the petitioner to put forth evidence sufficient to support a prima facie claim.

I. The Court should enunciate a standard affording appropriate weight to the interests furthered by anonymous speech.

The First Amendment fully protects anonymous lawful communications on the Internet. And New York's Constitution, as well as its anti-SLAPP and shield laws, reflects the state's own strong public policy of protecting anonymous speakers. These speech protections are critical not only for individual speakers, but also for websites, including media entities, that host anonymous speech. Especially now, at a time when public figures are increasingly attempting to silence critics by targeting them with meritless (yet costly) lawsuits, such protections are crucial.

A. The First Amendment provides ample protection for anonymous speakers on the Internet.

The First Amendment protects the right to speak anonymously. *See Watchtower Bible & Tract Soc'y v. Village of Stratton*, 536 U.S. 150, 166–67 (2002);

Buckley v. Am. Const. L. Found., Inc., 525 U.S. 182, 199–200 (1999); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 341–43, 357 (1995). Indeed, as the Supreme Court has underscored, anonymous speech has played an important role throughout U.S. history. Revolutionary writers garnered public support through tracts published under pseudonyms such as “Common Sense” or “Farmer.” *McIntyre*, 514 U.S. at 368 (Thomas, J., concurring). After the Revolution, Federalists and anti-Federalists relied on the cloak of anonymity to debate the Constitution, writing under names like “Publius” and “An American Citizen.” *Id.* As this history demonstrates, anonymous speech has “an honorable tradition of advocacy and of dissent.” *Id.* at 357.

The right to speak anonymously applies fully online. The Internet is a vital forum for free expression; as the Supreme Court has recognized, it has created previously unrealized opportunities for free speech by providing an inexpensive, accessible medium for individuals to express their thoughts worldwide. *See Reno v. ACLU*, 521 U.S. 844, 853, 870 (1997). And “[t]he Internet is a particularly effective forum for the dissemination of anonymous speech.” *Sony Music Ent. Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 562 (S.D.N.Y. 2004). Subpoenas of anonymous online speakers’ identities “have a significant chilling effect on Internet communications and thus on basic First Amendment rights.” *Doe v. 2themart.com Inc.*, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001).

Exploring why some speakers may wish to hide their identities underscores the importance of the First Amendment’s protections for anonymity. Speakers may fear retribution for voicing unpopular viewpoints, including “economic or official retaliation,” “social ostracism,” or physical harm. *McIntyre*, 514 U.S. at 341–42. Anonymity enables “a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent.” *Id.* Relatedly, speakers may turn to anonymity to avoid stereotyping or to distance their viewpoints from organizations with which they are intertwined. In this way, “[a]nonymity is a shield from the tyranny of the majority,” serving to “protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society.” *Id.* at 357. Without zealous and consistent enforcement of the right to speak anonymously, many individuals would self-censor.

B. New York law recognizes the value of anonymous speech.

New York has a distinguished history of protecting anonymous speech. In 1735, the printer John Peter Zenger was prosecuted for publishing anonymous pamphlets criticizing New York’s colonial governor. *Id.* at 361 (Thomas, J., concurring). The jury “refused to convict Zenger—an action widely viewed as one of the first instances when the connection between the protection of anonymous sources and the maintenance of a free press was recognized in the new world.” *Holmes v. Winter*, 22 N.Y.3d 300, 307 (2013). New York quickly became a locus

of the publishing industry. *Id.* Enshrining the state’s longstanding speech protections, Article 1, § 8 of the New York Constitution was adopted in 1821, providing that “Every citizen may freely speak, write and publish his or her sentiments on all subjects . . . and no law shall be passed to restrain or abridge the liberty of speech or of the press.” This provision predates the First Amendment’s application to the states by a century and uses more expansive language, reflecting New York’s special solicitude for speech and press rights. *Id.*

New York’s statutes also evidence its strong public policy of protecting speech, including anonymous speech. New York’s shield law provides journalists with an absolute privilege from forced disclosure of materials obtained or received in confidence, including a source’s identity. N.Y. Civ. Rights Law § 79-h(b). It recognizes that “many valuable sources of news will be lost if journalists can be compelled on threat of contempt to reveal their sources in public forums, thus exposing them to legal, and possibly illegal, risks.” *Oak Beach Inn Corp. v. Babylon Beacon, Inc.*, 62 N.Y.2d 158, 168 (1984); *see also Holmes*, 22 N.Y.3d at 309 (protecting sources’ anonymity “assure[s] a continued flow of information to reporters and, thus, to the public”); *O’Neill v. Oakgrove Constr., Inc.*, 71 N.Y.2d 521, 529 (1988). Similarly, protecting the anonymity of Internet speakers safeguards them from retribution and ensures valuable information reaches the public.

New York also protects speech by allowing for the dismissal of strategic lawsuits against public participation (“SLAPPs”). *See* N.Y. Civ. Rights Law §§ 70-a, 76-a. SLAPPs are meritless, costly, time-consuming lawsuits “brought primarily to chill the valid exercise of a defendant’s right to free speech,” often including defamation claims. *Ernst v. Carrigan*, 814 F.3d 116, 117 (2d Cir. 2016). As one court commented, “[s]hort of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined.” *Gordon v. Marrone*, 155 Misc. 2d 726, 736 (Westchester Cty. Sup. Ct. 1992), *aff’d*, 202 A.D.2d 104 (2d Dep’t 1994). The New York Legislature, observing a rise in SLAPPs brought by powerful figures, recently strengthened its anti-SLAPP law to enable defendants to speedily dismiss claims brought against them based on speech on issues of public interest. *See* S52A Sponsor Mem. (July 22, 2020); L. 2020, ch. 250, Bill Jacket at 5–6. Protections for anonymous online speakers implicate these concerns. Indeed, while anti-SLAPP laws protect speakers who have already been sued, pre-suit disclosure standards can help ward off SLAPPs “at an early stage of the discovery process.” LyriSSa Barnett Lidsky, *Anonymity in Cyberspace: What Can We Learn from John Doe?*, 50 B.C. L. Rev. 1373, 1377 (2009). These legal protections are complementary and, as New York’s legislators affirmed, essential.

C. Media entities have a strong interest in protecting anonymous online speech.

Media entities have a First Amendment interest in protecting the speech of those who contribute information and commentary to their websites. Media entities do more than report the news; they allow for outside comment on op-ed pages and in letters to the editor, engaging the community in discussion of public affairs. Online—where the space constraints of print do not exist—news outlets can foster even more speech; readers publish commentary, criticism, and praise, and those who disagree can respond immediately. However, if readers’ speech is chilled by the fear that their identities will be exposed, news sites’ contribution to public discourse lessens.

Media entities also benefit from clear, consistent rules for when anonymous online speakers’ identities may be revealed. Unpredictability can deter users from posting valuable comments. *Cf. Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (describing how vagueness in statutes that “abut[] upon sensitive areas of basic First Amendment freedoms” “inhibit[s] the exercise of (those) freedoms” (citations omitted)). For this additional reason, amici urge the Court to announce a clear, speech-protective standard for pre-suit disclosure petitions involving anonymous online speakers.

II. The Court can account for the weighty interests in protecting anonymous speech by adopting the *Dendrite* test.

When a petitioner seeks to unmask an anonymous speaker, the court's task is to develop a disclosure test that makes it neither too easy for wrongdoers to hide behind a pseudonym, nor too easy for a public figure to expose and silence critics for exercising their First Amendment rights. The Constitution places a heavy thumb on the scale in favor of anonymity, "accord[ing] greater weight to the value of free speech than to the dangers of its misuse." *McIntyre*, 514 U.S. at 357. A relaxed disclosure standard would "chill potential posters from exercising their First Amendment right to speak anonymously." *Doe No. 1 v. Cahill*, 884 A.2d 451, 457 (Del. 2005). Moreover, disclosure gives petitioners immediate relief by allowing them to use "extra-judicial self-help remedies" against speakers, from public criticism to firing. *Id.*; see also *Swiger v. Allegheny Energy, Inc.*, No. 05-CV-5725 (JCJ), 2006 WL 1409622 (E.D. Pa. May 19, 2006) (power company fired employee who posted anonymous criticism after identifying employee via subpoena). Given the extensive First Amendment interests in preserving a robust marketplace of ideas online, the Court should adopt a rigorous standard to protect the anonymity of online speakers.

In the instant case, the trial court held that a petitioner seeking pre-suit disclosure under CPLR 3102(c) need only "allege[] facts, which state a cause of action." R. 5 (citing *Konig v. WordPress.com*, 112 A.D.3d 936 (2d Dep't 2013);

Toal v. Staten Island Univ. Hosp., 300 A.D.2d 592 (2d Dep’t 2002)). But the statute itself does not impose this standard. It provides simply, “[b]efore an action is commenced, disclosure to aid in bringing an action . . . may be obtained, but only by court order.” N.Y. C.P.L.R. 3102(c). As discussed *infra* at 28, other Appellate Divisions apply a different standard, requiring petitioners to state a claim *and* introduce evidence. *See, e.g., Ero v. Graystone Materials, Inc.*, 252 A.D.2d 812, 814 (3d Dep’t 1998). This Court, moreover, has never addressed in depth whether it should set a higher standard for petitions seeking disclosure of anonymous online speakers’ identities. Given the strong First Amendment concerns arising in this context, coupled with New York’s speech-protective public policy, amici urge the Court to impose an appropriately rigorous standard for such disclosure requests.

The leading standard for unmasking anonymous Internet speakers was established in *Dendrite International, Inc. v. Doe No. 3*, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001); it provides:

- 1) the plaintiff must attempt to **notify** the anonymous speaker and allow time for response;
- 2) the plaintiff must **specify** the speaker’s allegedly defamatory statements;
- 3) the plaintiff must adequately **plead** each element of the claim, such that it would withstand a motion to dismiss;
- 4) the plaintiff must produce sufficient **evidence** to establish each element of a prima facie defamation claim; and

5) the court must **balance** the speaker's First Amendment right of anonymous free speech against the strength of plaintiff's prima facie case and need for disclosure.

Courts employing this test recognize that a mere pleading standard like the one used below "would set the bar too low, chilling potential speakers from speaking anonymously on the internet." *Mobilisa, Inc. v. Doe*, 170 P.3d 712, 720 (Ariz. Ct. App. 2007). The *Dendrite* standard better protects anonymous speech by requiring petitioners to establish strong legal **and** factual bases for their claims. It also offers flexibility, allowing courts to consider parties' competing concerns case by case. It is the standard that "most appropriately balances a speaker's constitutional right to anonymous Internet speech with a plaintiff's right to seek judicial redress from defamatory remarks." *Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432, 456 (Md. 2009).

Numerous courts have adopted or borrowed heavily from *Dendrite*'s test. *See, e.g., E. Coast Test Prep LLC v. Allnurses.com, Inc.*, 167 F. Supp. 3d 1018 (D. Minn. 2016); *Koch Indus., Inc. v. Does 1-25*, No. 10-CV-1275 (DAK), 2011 WL 1775765 (D. Utah May 9, 2011); *Fodor v. Doe*, No. 10-CV-798 (RCJ) (VPC), 2011 WL 1629572 (D. Nev. Apr. 27, 2011); *SaleHoo Grp., Ltd. v. ABC Co.*, 722 F. Supp. 2d 1210 (W.D. Wash. 2010); *Doe I v. Individuals*, 561 F. Supp. 2d 249 (D. Conn. 2008); *Highfields Cap. Mgmt. L.P. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2005); *Doe v. Coleman*, 497 S.W.3d 740 (Ky. 2016); *In re Ind. Newspapers, Inc.*, 963 N.E.2d 534

(Ind. Ct. App. 2012); *Pilchesky v. Gatelli*, 12 A.3d 430 (Pa. Super. Ct. 2011); *Mortg. Specialists, Inc. v. Implode-Explode Heavy Indus., Inc.*, 999 A.2d 184 (N.H. 2010); *Brodie*, 966 A.2d at 456–57; *Mobilisa*, 170 P.3d at 720.³ It is the framework around which courts “ha[ve] begun to coalesce.” *SaleHoo*, 722 F. Supp. 2d at 1214.

Some trial courts within the Second Department have already adopted and applied all or some of the *Dendrite* factors, see *Lemon Juice v. Twitter, Inc.*, 44 Misc. 3d 1225(A) (Kings Cty. Sup. Ct. 2014); *Golden v. Romanowski*, No. 2010-028167, 2011 WL 11047264 (Suffolk Cty. Sup. Ct. May 10, 2011); *Ottinger v. The Journal News*, No. 08-03892, 2008 WL 4375330 (Westchester Cty. Sup. Ct. June 27, 2008), as have other New York trial courts, see *Deer Consumer Prods., Inc. v. Little*, 35 Misc. 3d 374 (N.Y. Cty. Sup. Ct. 2012); *Greenbaum v. Google, Inc.*, 18 Misc. 3d 185 (N.Y. Cty. Sup. Ct. 2007). By adopting the *Dendrite* test, this Court would provide essential safeguards for anonymous online speakers in New York, in line with the state’s speech-protective policy and traditions.

Dendrite does not set too high a bar for disclosure. It permits plaintiffs with strong claims to identify anonymous speakers. See, e.g., *Fodor*, 2011 WL 1629572, at *5; *Individuals*, 561 F. Supp. 2d at 249; *Ottinger*, 2008 WL 4375330. In *Dendrite*

³ Some courts employ *Dendrite* but omit the balancing factor, a path set by the Delaware Supreme Court in *Cahill*, 884 A.2d at 457. See, e.g., *Best W. Int’l, Inc. v. Doe*, No. 06-CV-1537 (PHX) (DGC), 2006 WL 2091695 (D. Ariz. July 25, 2006); *Thomson v. Doe*, 356 P.3d 727 (Wash. Ct. App. 2015); *Solers, Inc. v. Doe*, 977 A.2d 941 (D.C. 2009); *Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231 (Cal. Ct. App. 2008); *In re Does 1-10*, 242 S.W.3d 805 (Tex. App. 2007). As discussed below, however, that factor serves important First Amendment interests.

itself, the court allowed the plaintiff to identify two of the four anonymous speakers involved. 775 A.2d at 764. In another case decided that day, the court applied *Dendrite* and ordered that the speaker’s identity be revealed. *Immunomedics, Inc. v. Doe*, 775 A.2d 773, 777 (N.J. Super. Ct. App. Div. 2001). Moreover, a strict standard is appropriate because identifying an anonymous speaker is, itself, “a very important form of relief,” which allows the plaintiff to “seek revenge or retribution” without winning—or even filing—a suit against the speaker. *Cahill*, 884 A.2d at 457. Because of the threat of libel claims and extra-judicial retribution, such relief “poses a real threat to chill protected comment on matters of interest to the public.” *Highfields*, 385 F. Supp. 2d at 980. Courts ordinarily do not, and should not, give such substantial relief absent proof that the plaintiff can support their claim. Just as anti-SLAPP laws impose a heightened standard to protect speech on issues of public interest, courts assessing requests to unmask anonymous online speakers should set an appropriately high bar given the First Amendment values at stake.

III. Under the *Dendrite* standard, Kennedy’s petition for pre-suit disclosure of DowneastDem’s identity should be rejected.

Amici urge this Court to adopt the five-part *Dendrite* test and reverse the trial court’s order granting Kennedy’s petition. As detailed below, under the *Dendrite* test, pre-suit disclosure of the identity of DowneastDem, an anonymous online speaker, should have been rejected.

A. DowneastDem has received notice of Kennedy’s motion for pre-suit disclosure.

The first requirement is for the petitioner to attempt to notify the anonymous speaker of the discovery request, and to withhold action for a reasonable time to allow the speaker to retain counsel and file an opposition. *Dendrite*, 775 A.2d at 760. This requirement recognizes that notice and an opportunity to respond are core components of due process. *See Jones v. Flowers*, 547 U.S. 220, 226 (2006). When the subpoena target has already notified the speaker, however, courts have not required the petitioner to do so too. *See Pilchesky*, 12 A.3d at 442; *Krinsky*, 72 Cal. Rptr. 3d at 244; *Mobilisa*, 170 P.3d at 721.

Here, the record contains no evidence that Kennedy attempted to notify DowneastDem. However, DowneastDem has learned of the petition, as evidenced by their filing of a petition to quash the resulting subpoena in California state court. *See DowneastDem v. Kennedy*, No. RG21102647 (Alameda Cty. Super. Ct., filed June 23, 2021); *cf. Krinsky*, 72 Cal. Rptr. 3d at 244 (“Obviously [the speaker] has already learned of the subpoena or he would not be seeking protection.”). As such, the notification requirement has been satisfied.

B. Kennedy pled verbatim the allegedly defamatory words.

Second, the petitioner must specify the anonymous speaker’s allegedly actionable statements, so that courts can analyze the validity of the claims. *Dendrite*, 775 A.2d at 760. This requirement is already in effect for defamation claims, as

New York law requires plaintiffs to specify the challenged statements and their time, place, manner, and audience. N.Y. C.P.L.R. 3016(a); *Kimso Apartments, LLC v. Rivera*, 180 A.D.3d 1033, 1034 (2d Dep’t 2020). Kennedy’s petition met these requirements, though it should have included DowneastDem’s full post for context. *See* R. 53 ¶¶ 5–6, R. 57–58 ¶¶ 18–20.

C. Kennedy’s defamation claim lacks merit as pled.

Third, the petitioner must state a viable claim, sufficient to withstand a motion to dismiss. *Dendrite*, 775 A.2d at 760. Under New York law, when assessing a motion to dismiss, the court “must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *JDI Display Am., Inc. v. Jaco Elecs., Inc.*, 188 A.D.3d 844, 845 (2d Dep’t 2020). “[A]llegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration.” *Id.* (citation omitted); *see also* N.Y. C.P.L.R. 3211(a)(7). In New York, the elements of a defamation claim brought by a public figure are: 1) a false statement; 2) published without privilege or authorization to a third party; 3) made with actual malice; 4) that causes injury to plaintiff, either special damages or libel per se. *See Freeman v. Johnston*, 84 N.Y.2d 52, 56 (1994); *Salvatore v. Kumar*, 45 A.D.3d 560, 563 (2d Dep’t 2007). Kennedy’s petition fails to state a valid defamation claim

because he does not sufficiently allege actual malice, the complained-of statements are substantially true, and they are nonactionable opinion.

1. Kennedy failed to adequately plead actual malice.

Kennedy is a public figure, as he admits, so he must adequately plead actual malice to proceed. R. 201. That is, he must adequately plead that the statement at issue was made “‘with knowledge that it was false or with reckless disregard of whether it was false or not.’” *Freeman*, 84 N.Y.2d at 56 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964)). The actual malice standard sets a high bar because “‘falsehoods relating to public figures are ‘inevitable in free debate’ and . . . publishers must have sufficient ‘breathing space’ so that the First Amendment’s commitment to ‘the principle that debate on public issues should be uninhibited, robust, and wide-open’ will be realized.” *Kipper v. NYP Holdings Co.*, 12 N.Y.3d 348, 355 (2009) (first quoting *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 52 (1988); then quoting *Sullivan*, 376 U.S. at 270). On a motion to dismiss, the plaintiff need not produce evidence of actual malice, but conclusory and speculative allegations are insufficient. *See Serratore v. Am. Port Servs., Inc.*, 293 A.D.2d 464, 465 (2d Dep’t 2002); *Sborgi v. Green*, 281 A.D.2d 230, 230 (1st Dep’t 2001). Accordingly, “‘specificity in the pleading of . . . actual malice is required.” *Themed Rests., Inc. v. Zagat Survey, LLC*, 4 Misc. 3d 974, 982–83 (N.Y. Cty. Sup. Ct. 2004), *aff’d*, 21

A.D.3d 826 (1st Dep’t 2005); *see also Jimenez v. United Fed’n of Tchrs.*, 239 A.D.2d 265, 266 (1st Dep’t 1997).

Kennedy makes two allegations of actual malice. First, he alleges that DowneastDem “knew that [his post] was false or had no reasonable grounds for believing it to be true.” R. 59 ¶ 21. In support of this conclusory allegation, Kennedy alleges DowneastDem did not claim to have attended the protest. *Id.* Yet whether a speaker witnessed an event does not determine whether their speech about it is knowingly or recklessly false. Kennedy adds that DowneastDem’s post misconstrued the Der Tagesspiegel article it was based on. *Id.*; *see also* R. 54 ¶ 8 & n.1. Yet, as appellant details, DowneastDem accurately restated its facts, including that the protest constituted one large, spread-out event. *See* Appellant’s Br., Dkt. 6, 23–26; R. 82–84. Because that allegation is “flatly contradicted” by evidence incorporated in Kennedy’s petition, it is not entitled to be accepted as true and cannot carry petitioner’s pleading burden. *JDI Display Am.*, 188 A.D.3d at 845 (citation omitted); *see also* R. 205 (Kennedy agreeing article is incorporated by reference).

Second, Kennedy alleges that DowneastDem’s “prior conduct shows that their subjective intent was to harm Petitioner.” R. 59 ¶ 22. This allegation is speculative and does not show actual malice, which “should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will.” *Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 510 (1991). Actual malice focuses on the speaker’s

attitude toward the truth, not the plaintiff. *See Chandok v. Klessig*, 632 F.3d 803, 815 (2d Cir. 2011). Kennedy attempts to bolster this speculation by noting that a past post by DowneastDem called Kennedy “notorious” and the “family black sheep.” R. 59–60 ¶ 22. Yet, as appellant describes, these statements are protected opinion. *See Appellant’s Br. 27*; R. 115–16. In sum, Kennedy’s defamation claim fails because he does not adequately plead that DowneastDem spoke with actual malice.

2. *Kennedy failed to adequately plead falsity.*

Kennedy also fails to state a viable defamation claim against DowneastDem because the challenged statements are protected opinion and not substantially false. *See Gross v. N.Y. Times Co.*, 82 N.Y.2d 146, 152 (1993). Neither substantially true statements nor statements of opinion—which cannot by their nature be proven false—are actionable. *See id.*; *Goldberg v. Levine*, 97 A.D.3d 725, 726 (2d Dep’t 2012). In assessing whether a statement is protected opinion, courts ask:

(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal . . . that what is being read or heard is likely to be opinion, not fact.

Gross, 82 N.Y.2d at 153 (citations and quotation marks omitted).

Additionally, a statement is protected opinion if it recites the facts on which it is based, allowing readers to draw their own conclusions. *Id.*

DowneastDem’s challenged statements are protected opinion. The statements that Kennedy “join[ed] neo-Nazis” at a protest “organized by right-wing extremist organizations” are incapable of precise meaning or being proven false. R. 53 ¶¶ 5–6. Readers will have different understandings of “join” and its application to an event neo-Nazis attended alongside many others. There is “tremendous imprecision of the meaning and usage of” terms like neo-Nazi and right-wing extremist in “political debate.” *Buckley v. Littell*, 539 F.2d 882, 892–93 (2d Cir. 1976). Readers will understand DowneastDem as voicing their opinion on these matters. *Cf. id.* (description of plaintiff as “fellow traveler” of “radical right” was nonactionable opinion); *Brimelow v. N.Y. Times Co.*, No. 20-CV-222 (KPF), 2020 WL 7405261, at *6 (S.D.N.Y. Dec. 16, 2020) (same, regarding description of plaintiff as “white nationalist”); *Schwartz v. Nordstrom, Inc.*, 160 A.D.2d 240, 241 (1st Dep’t 1990) (same, where “defendants accused plaintiff of being a Nazi”).

Contextually, DowneastDem published the post anonymously on an online community forum about controversial COVID-19 restrictions. R. 81; *cf. Jacobus v. Trump*, 55 Misc. 3d 470, 478–79 (N.Y. Cty. Sup. Ct. 2017), *aff’d*, 156 A.D.3d 452 (1st Dep’t 2017) (“New York courts have consistently protected statements made in online forums as statements of opinion” given their “freewheeling” nature (citations omitted)); *Melius v. Glacken*, 94 A.D.3d 959, 960 (2d Dep’t 2012) (statements “made in the midst of a heated political debate” understood as opinion); *Sandals*

Resorts Int'l Ltd. v. Google, Inc., 86 A.D.3d 32, 39 (1st Dep't 2011) (anonymous online communications more likely viewed as opinion). DowneastDem also fully disclosed the facts supporting these opinions, including by linking to the Der Tagesspiegel article and describing the event and Kennedy's speech. R. 81; *cf. Gross*, 82 N.Y.2d at 153; *Silverman v. Daily News, L.P.*, 129 A.D.3d 1054, 1055 (2d Dep't 2015) (article reporting on principal's "racist writings" and ties to "white supremacist group" was nonactionable given "full disclosure of the facts supporting the opinions"); *Russell v. Davies*, 97 A.D.3d 649, 650–51 (2d Dep't 2012) (same, regarding description of plaintiff's essay as "racist and anti-Semitic").

Moreover, none of DowneastDem's challenged statements are substantially false. Kennedy does not allege that neo-Nazi and far-right protesters were absent from the large gathering. Appellant's Br. 7–19, 32–34; R. 82–84; *cf. Sandals Resorts Int'l*, 86 A.D.3d at 39 (petitioner failed to state defamation claim where nothing in petition showed challenged statements were inaccurate). To the contrary, Kennedy pleads that while he was speaking, far-right extremists were demonstrating outside the Reichstag—admitting such individuals attended the day's events. R. 54 ¶ 8. His allegations that one Der Tagesspiegel interviewee said she had not seen neo-Nazis and that Kennedy's speech "decr[ied] Nazism and totalitarianism" do not show falsity. R. 54 ¶ 7; R. 81. Next, to challenge DowneastDem's statement that the protest was "organized by right-wing extremist organizations," Kennedy pleads that

the organizing group, Querdenken, “vehemently opposes all forms of fascism and extremism.” *See* R. 53–54 ¶¶ 5–7. This conclusory statement lacks support and does not establish falsity. In fact, the German government placed Querdenken on a watchlist due to concerns over the group’s far-right extremism. *See* Appellant’s Br. 11; R. 132, 150.

D. Kennedy failed to present evidence sufficient to establish a prima facie case as to each element of his defamation claim.

Even if a court finds the petitioner stated a viable claim, it should require the petitioner to produce admissible evidence supporting all possible elements of that claim before unmasking an anonymous Internet speaker. *Dendrite*, 775 A.2d at 760. The evidence must be sufficient to make a prima facie case—that is, to “support a ruling in favor of its proponent if no controverting evidence is presented.” *Krinsky*, 72 Cal. Rptr. 3d at 245 n.14 (citation omitted). This requirement is at the core of *Dendrite*’s First Amendment protections. A lesser standard that asks petitioners “simply to plead and pray . . . offer[s] too little protection to the [speaker’s] competing interests.” *Highfields*, 385 F. Supp. 2d at 975. Requiring evidence “ensures that the [petitioner] is not merely seeking to harass or embarrass the speaker or stifle legitimate criticism.” *Krinsky*, 72 Cal. Rptr. 3d at 245. This evidentiary requirement is essential because, once identified, anonymous speakers may face SLAPPs brought to harass and silence them. *See* S52A Sponsor Mem. (July 22, 2020); *Glob. Telemedia Int’l, Inc. v. Doe 1*, 132 F. Supp. 2d 1261 (C.D. Cal. 2001)

(applying California’s anti-SLAPP statute to dismiss case against anonymous online speaker); *Ampex Corp. v. Cargle*, 27 Cal. Rptr. 3d 863 (Cal. Ct. App. 2005) (holding that company’s defamation suit against former employee who anonymously posted critical online comments, identified via company’s subpoena, was SLAPP); Sean Kilian, *In Defense of Anonymous Online Speech in Oklahoma*, 47 Tulsa L. Rev. 721, 739 (2012) (calling *Dendrite* “critical for cyber-SLAPP defendants who wish to remain anonymous”).

If the petitioner does have a valid claim, the burden of requiring evidence “is neither heavy nor unfamiliar,” especially when examined alongside anti-SLAPP law. *ZL Techs., Inc. v. Does 1-7*, 220 Cal. Rptr. 3d 569, 597 (Cal. Ct. App. 2017). If the anonymous speaker, once identified and sued, brought an anti-SLAPP motion against the petitioner, under New York law, the court would dismiss the case unless the petitioner demonstrated their “cause of action ha[d] a substantial basis in law.” N.Y. C.P.L.R. 3211(g)(1)–(2). Absent an anti-SLAPP motion, the petitioner would eventually have to support his claims to prevail. Adducing evidence at the pre-suit disclosure stage is no harder, as a petitioner typically “knows the statement that was made” and has “evidence of its falsity and the effect it had on her.” *Krinsky*, 72 Cal. Rptr. 3d at 245. Additionally, courts have required petitioners to substantiate only elements of the claim within their control, which in defamation cases has excluded

actual malice. *See, e.g., Mobilisa*, 170 P.3d at 720; *Ottinger*, 2008 WL 4375330; *Cahill*, 884 A.2d at 463–64.

Kennedy failed to submit evidence supporting each possible element of his defamation claim, including falsity. He did not submit DowneastDem’s full Daily Kos post, which provides context needed to assess whether the challenged statements are protected opinion. Kennedy introduced three news articles, which are inadmissible for the truth of their contents, so cannot carry his evidentiary burden. R. 222–40; *see Young v. Fleary*, 226 A.D.2d 454, 455 (2d Dep’t 1996). Those articles, in any event, undermine the falsity element, as they report that “far-right extremists,” conspiracists, and “noticeable numbers of neo-Nazis” attended the protest. R. 222–40. Additionally, Kennedy’s argument that his petition was properly verified does not negate his lack of probative evidence. *Cf. SaleHoo*, 722 F. Supp. 2d at 1218 (defamation plaintiff who relied on pleadings alone failed this part of *Dendrite*); *Riverhead Bldg. Supply Corp. v. Regine Starr, Inc.*, 249 A.D.2d 532, 533 (2d Dep’t 1998) (verified pleading without evidentiary support was “patently inadequate”).⁴ In sum, because Kennedy did not support his petition with adequate evidence—a critical component of *Dendrite*’s speech protections—he should not be entitled to identify DowneastDem.

⁴ For its part, Daily Kos submitted an affidavit from its founder describing the anonymous authorship system, news articles, DowneastDem’s post, and the Der Tagesspiegel article with a translation. R. 106–57.

E. The balance of equities weighs in favor of preserving DowneastDem’s anonymity.

Last, if a court finds the preceding factors satisfied, it “must balance the defendant’s First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant’s identity to allow the plaintiff to properly proceed.” *Dendrite*, 775 A.2d at 760–61. Doing so accounts for “the vast array of factually distinct cases likely to involve anonymous speech,” *Mobilisa*, 170 P.3d at 720, and ensures that “First Amendment considerations are brought into proper focus,” *Pilchesky*, 12 A.3d at 446. This balancing resembles the test for injunctive relief, and rightly so, since “both such orders change the status quo. Unlike most parties subject to a preliminary mandatory injunction, however, an unmasked anonymous speaker cannot later obtain relief from the order.” *Mobilisa*, 170 P.3d at 721.

On the speaker’s side of the balance, courts consider factors including the nature of the speech; the speaker’s expectation of privacy; and whether disclosure will harm the speaker and chill speech. *See Highfields*, 385 F. Supp. 2d at 980; *Deer Consumer Prods.*, 35 Misc. 3d at 390; *Pilchesky*, 12 A.3d at 445–46; *Mobilisa*, 170 P.3d at 720. As to the petitioner, courts assess the legal and factual strength of their claim; the magnitude of their likely harms; and whether the petitioner can proceed without disclosure. *See Art of Living Found. v. Does 1-10*, No. 10-CV-5022 (LHK),

2011 WL 5444622, at *10 (N.D. Cal. Nov. 9, 2011); *Highfields*, 385 F. Supp. 2d at 980; *Lemon Juice*, 44 Misc. 3d 1225(A).

Here, the balance strongly favors DowneastDem. Their speech discussed a public figure and contentious political subject. *Cf. Pilchesky*, 12 A.3d at 445 (when balancing, “comments on matters of public importance or those which criticize public officials are entitled to robust protection”); *see also Gordon*, 155 Misc. 2d at 736 (describing need to safeguard “[p]ersons who have been outspoken on issues of public importance”). In addition, DowneastDem had a strong expectation of privacy because Daily Kos guards users’ anonymity. R. 91–92 ¶¶ 9–12. The speech of DowneastDem and other Daily Kos users would be chilled, and potentially punished, by disclosure. *Id.*; *cf. Greenbaum*, 18 Misc. 3d at 191 (denying pre-suit disclosure that “would have a chilling effect on protected political speech”). Given the contentious nature of the COVID-19 vaccine debate at the heart of the challenged statements, DowneastDem could well face threats and retaliation if unmasked. *See, e.g.,* Bianca Nogrady, ‘*I Hope You Die*’: *How the COVID Pandemic Unleashed Attacks on Scientists*, *Nature* (Oct. 13, 2021), <https://perma.cc/LNW9-VKFZ>; Kalhan Rosenblatt, *She Called Out Health Care Misinfo on TikTok. Then, the Trolls Found Her.*, *NBC News* (May 1, 2021), <https://perma.cc/Y8EL-AY8A>. DowneastDem, therefore, has strong interests in maintaining anonymity.

On Kennedy’s side of the balance, the legal and factual bases for his defamation claim are especially weak. *See supra* pp. 16–22. He makes only general allegations of reputational harm, complicated by the many other news articles that reported on the same events. *Cf. Highfields*, 385 F. Supp. 2d at 981 (finding “no reason to believe, on the record made here” that the challenged speech harmed plaintiff). Critically, Kennedy could proceed against DowneastDem without disclosure, as evidenced by the fact that Kennedy and DowneastDem are engaged in litigation in California state court. *See DowneastDem v. Kennedy*, No. RG21102647 (Alameda Cty. Super. Ct., filed June 23, 2021); *cf. Art of Living Found.*, 2011 WL 5444622, at *10 (finding speaker’s “engagement in the litigation, albeit under a pseudonym, diminishes Plaintiff’s need to obtain his true name at this time”).

* * *

As the foregoing analysis makes clear, adopting a stricter standard for pre-suit disclosure petitions that seek to identify anonymous online speakers is essential to protecting the First Amendment rights at issue, in this case and others like it. Because Kennedy cannot meet the *Dendrite* standard, amici urge this Court to reverse the trial court’s order granting his petition.

IV. Alternatively, this Court should join other Appellate Divisions in requiring prima evidence supporting each element of the claim.

If this Court does not adopt the *Dendrite* standard, amici instead urge it to adopt the evidentiary standard used by the other Appellate Divisions when addressing petitions for pre-suit disclosure under CPLR 3102(c). Because CPLR 3102(c) does not prescribe the standard for disclosure—providing only that “disclosure to aid in bringing an action . . . may be obtained, but only by court order”—courts may set the appropriate standard. Other Appellate Divisions require petitioners to adequately plead their claim, submit evidence supporting it on a prima facie basis, and show that the disclosure sought is material and necessary to bringing suit. *See, e.g., Ero*, 252 A.D.2d at 814. The evidence must be based on first-hand knowledge and viewed in the light most favorable to the petitioner. *Id.* The First, Third, and Fourth Departments, as well as trial courts within the Second, all use this standard. *See, e.g., Nicol v. Town of Rotterdam*, 134 A.D.2d 754 (3d Dep’t 1987); *Gleich v. Kissinger*, 111 A.D.2d 130 (1st Dep’t 1985); *In re Janosik*, 71 A.D.2d 1058 (4th Dep’t 1979); *Dreyer v. Stachecki*, 66 Misc. 3d 1219(A) (Suffolk Cty. Sup. Ct. 2020); *Doe v. Roman Cath. Archdiocese of N.Y.*, 64 Misc. 3d 1220(A) (Westchester Cty. Sup. Ct. 2019); *Estate of Gallagher v. Cath. Foreign Mission Soc’y of Am., Inc.*, 64 Misc. 3d 943 (Westchester Cty. Sup. Ct. 2019); *In re Estate of Tongate*, 864 N.Y.S.2d 761 (Chemung Cty. Sup. Ct. 2008). In contrast, the trial court below

applied a standard that asks only whether the petitioner stated a claim. R. 5 (citing *Konig*, 112 A.D.3d at 936; *Toal*, 300 A.D.2d at 592).

Requiring petitioners to provide solid legal *and* factual support for their claims before granting pre-suit disclosure is especially important in anonymous online speech cases given the attendant First Amendment concerns, such as chilling speech and subjecting speakers to retaliation. Imposing an evidentiary requirement would also uphold “the consistent tradition in this State of providing the broadest possible protection” for speech, as enshrined in New York’s Constitution and as reaffirmed in the recent anti-SLAPP amendments. *O’Neill*, 71 N.Y.2d at 529; *see also* N.Y. Const. art. 1, § 8; L. 2020, ch. 250. Moreover, by coming into alignment with other New York courts, this Court would provide much-needed clarity and consistency to the state’s many online speakers and media entities.

Under this standard, Kennedy’s petition would fail. As discussed *supra* at 16–25, he did not adequately plead a defamation claim or provide evidentiary support for one. *Cf., e.g., Sandals Resorts Int’l*, 86 A.D.3d at 38 (denying petition that failed to demonstrate petitioner had viable defamation claim); *Nicol*, 134 A.D.2d at 755 (denying petition where neither attorney affidavit nor documentary evidence supported prima facie claim). Nor are all—or any—elements of the subpoena necessary to bring suit against DowneastDem. *See* Appellant’s Br. 36–38. The trial

court, therefore, erred by granting Kennedy's petition for pre-suit disclosure under CPLR 3102(c).

CONCLUSION

For the foregoing reasons, amici urge this Court to adopt an appropriately stringent standard to govern the identification of anonymous online speakers in this context, and to reverse the trial court's order.

Dated: December 22, 2021
New York, New York

Respectfully submitted,

By: 

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APPELLATE DIVISION – SECOND DEPARTMENT

PRINTING SPECIFICATIONS STATEMENT

It is hereby certified, pursuant to 22 NYCRR 1250.8(j) that, according to the word count of the word-processing system used to prepare this brief, the total word count for all printed text in the body of the brief exclusive of the material omitted under 22 NYCRR 1250.8(f)(2) is 7,000 words.

This brief was prepared on a computer using:

- Microsoft Word (Version 16.53) for Microsoft 365
- Times New Roman, a proportionally spaced font
- 14-point size font

EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

P R E S E N T:

HON. MARY H. SMITH
JUSTICE OF THE SUPREME COURT

In the Matter of the Petition of
ROBERT F. KENNEDY, JR.,

Petitioner(s),

DECISION & ORDER

Index No.: 65319/2020

For an Order pursuant to Section 3102 (c) of the Civil Practice Law and Rules to compel pre-action Disclosure from:

KOS MEDIA, LLC d/b/a, DAILY KOS,

Respondent(s),

of the identity of the defendants JOHN DOE(s) being unknown to the Petitioner, in an action to be commenced.

Petitioner commenced this proceeding (Motion #1) for an order, authorizing the issuance of a subpoena duces tecum pursuant to CPLR 3102 (c), compelling respondent: to disclose copies of all documents in its possession, custody or control evidencing the identity of the Doe defendant(s), including but not limited to the contact information, name, address, telephone number, electronic email address(es), any Internet Protocol (IP) address(es), Media Access Control (MAC), internet connection or activity logs, account history including date and time of account creation, alternative pseudonyms, and any other information relevant to identifying the person(s) who have who use or have created, posted, or authored content under the pseudonym DowneastDem on the website Daily Kos (<https://www.dailykos.com>).

Respondent moves for sanctions (Motion #2) and for a protective order (Motion #3).

Petitioner moves for a protective order (Motion #4).

Petitioner moves for a stay of proceedings (Motion #5).

The following papers were read:

Order to Show Cause (#1), Petition, Affirmation, and Exhibit	1-4
Notice of Motion (#2), Affirmation, Affidavit, Exhibits (11), and Memo of Law	5-19
Notice of Motion (#3), Affirmation, Affidavit, Exhibits (11), and Memo of Law	20-34
Notice of Motion (#4), Affirmation, Exhibits (3), and Memo of Law	35-40
Notice of Motion (#5), Affirmation, Exhibits (3), and Memo of Law	41-46

By way of background, on or about August 29, 2020, defendants published an article under the pseudonym DowneastDem on the website Daily Kos with the headline: “Anti-Vaxxer RFK JR. joins neo-Nazis in massive Berlin ‘Anti-Corona’ Protest” (the “Article”), which stated that “[t]he protest was organized by right-wing extremist organizations - including the AfD party and various anti-Semitic conspiracy groups as well as the neo-Nazi NPD party. Among the speakers was Robert F. Kennedy Jr., who warned against the ‘totalitarianism’ of Angela Merkel” (collectively, Statements).

On November 30, 2020, petitioner commenced this proceeding, seeking pre-action discovery; namely, the identity of DowneastDem. The petition alleges that the Statements were false. The petition alleges that petitioner did not join neo-Nazis at a protest in Berlin nor speak at a protest organized by right-wing extremist organizations. Rather, the petition alleges, petitioner gave a speech decrying Nazism and totalitarianism of all kinds at a protest, which was initiated by a democratic group that opposes all forms of fascism and extremism. The petition also alleges that the only source cited by the Article makes plain that there were several gatherings on this day, which were organized by different groups, and that the demonstrations took place at different times and at different locations. The petition further alleges that the Statements are defamatory *per se* and will continue to cause significant damage to petitioner as long as they remain online. Based hereon, petitioner contends that he has alleged sufficient facts to make out a claim for libel and seeks an order, pursuant to CPLR 3102 (c), permitting petitioner to serve respondent with a subpoena to identify the proper parties to any potential future lawsuit for libel regarding the Article.

In response, respondent contends that the Statements were true. Respondent proffers several news articles, which, respondent contends, demonstrate that there was a large protest on August 29, 2020, that neo-Nazis were in attendance, and that the protest was organized by right wing extremists, including the specific group that invited petitioner to speak. In addition, respondent contends that DowneastDem accurately reflected the information contained in the cited source.

In reply, petitioner notes that the outstanding dispute appears to be whether the Statements were false and made with actual malice. Petitioner asserts, when the Statements are read together, a reasonable reader would have understood DowneastDem to have accused petitioner of joining—that is, closely associating himself with—neo-Nazis and that petitioner spoke at a rally organized by anti-Semites and neo-Nazis. Petitioner contends that these were statements of fact and that they were false. Petitioner rejects

respondent's assertion that the Statements accurately reflect the information in the cited source, as previously explained.

The Second Department has explained that “[a] petition for pre-action discovery limited to obtaining the identity of prospective defendants should be granted where the petitioner has alleged facts fairly indicating that he or she has some cause of action” (*Matter of Konig v WordPress.com*, 112 AD3d 936, 936 [2d Dept 2013]). Thus, a petitioner is entitled to obtain the identity of prospective defendants where a petitioner has alleged facts, which state a cause of action (*see Matter of Toal v Staten Is. Univ. Hosp.*, 300 AD2d 592, 592 [2d Dept 2002]).¹

“The elements of a cause of action [to recover damages] for defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation *per se*” (*Gaccione v Scarpinato*, 137 AD3d 857, 859 [2d Dept 2016], internal quotation marks omitted). “In determining whether a complaint states a cause of action to recover damages for defamation, the dispositive inquiry is whether a reasonable listener or reader could have concluded that the statements were conveying facts about the plaintiff” (*Matter of Konig v WordPress.com*, 112 AD3d 936, 937 [2d Dept 2013], internal quotation marks omitted). In addition, where a plaintiff is a public figure,² the plaintiff is required to plead that the defamatory statements were published with actual malice, that is, “with either knowledge that it was false or reckless disregard for the truth” (*Huggins v Moore*, 94 NY2d 296, 301 [1999]; *Crime Victims Ctr., Inc. v Logue*, 181 AD3d 556, 557 [2d Dept 2020]).

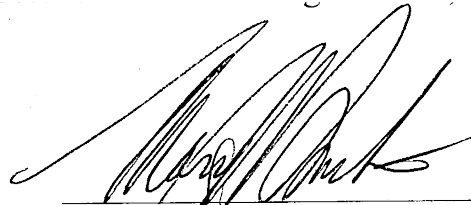
Here, the petition alleges sufficient facts, which fairly indicate that he has a claim for defamation and is thus entitled to pre-action discovery limited to obtaining the identity of prospective defendants. Respondent has raised a number of factual issues and legal arguments, which may provide a defense, in whole or in part, in any future litigation. These factual issues and legal arguments, however, do not provide a basis to deny the relief sought in the petition. To the extent not specifically addressed herein, the Court finds respondent's remaining arguments to be without merit.

¹ In the *Matter of Toal*, the Hon. Leo F. McGinny, J.S.C. dissented. Judge McGinny asserted that petitioner was required to establish a *prima facie* cause of action and that in determining whether the petitioner had made this showing, “the evidence presented must be considered in a light most favorable to the petitioner” (*Matt of Toal*, 300 AD2d at 593). Judge McGinny asserted that the petitioner had not submitted any evidence to support the petition, but merely the conclusory allegations of an attorney, which, he contended, was patently insufficient (*id.*).

² Petitioner concedes that he is a “limited purpose public figure,” which is an individual who is normally not a public figure, but becomes one for a limited range of issues by injecting her/himself or is drawn into a particular public controversy (*see O'Neil v Peekskill Faculty Ass'n*, 120 AD2d 36, 44 [2d Dept 1986]).

Based on the foregoing, the petition is granted; petitioner is directed to submit a proposed order within 20 days hereof. Given the foregoing, Motion ## 2, 3, 4, and 5 are denied as moot.

Dated: April 16, 2021
White Plains, New York



HON. MARY H. SMITH
Justice of the Supreme Court

EXHIBIT C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

In the Matter of the Petition of

ROBERT F. KENNEDY, JR.,

Petitioner,

For an Order Pursuant to Section 3102(c) of the Civil
Practice Law and Rules to compel pre-action disclosure
from:

KOS MEDIA, LLC d/b/a DAILY KOS,

Respondent,

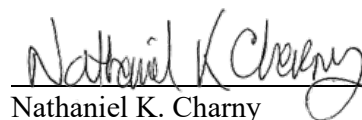
of the identity of the defendants JOHN DOE(s) being
unknown to the Petitioner, in an action to be
commenced.

NOTICE OF APPEAL

Index No. 65319/2020

PLEASE TAKE NOTICE that Respondent Kos Media, LLC d/b/a Daily Kos hereby
appeals to the Supreme Court of the State of New York, Appellate Division, Second Judicial
Department from a Decision & Order of the Supreme Court of the State of New York, County of
Westchester (Honorable Mary H. Smith, A.J.S.C., presiding) entered with the Clerk on the 16th
day of April, 2021. Respondent appeals from each and every part of the aforementioned
Decision & Order.

Dated: Rhinebeck, New York
May 4, 2021



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Attorneys for Respondent Kos Media LLC

To: Craig Wenner, Esq.
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Attorneys for Petitioner Robert K. Kennedy, Jr.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

P R E S E N T:

**HON. MARY H. SMITH
JUSTICE OF THE SUPREME COURT**

In the Matter of the Petition of
ROBERT F. KENNEDY, JR.,

Petitioner(s),

DECISION & ORDER

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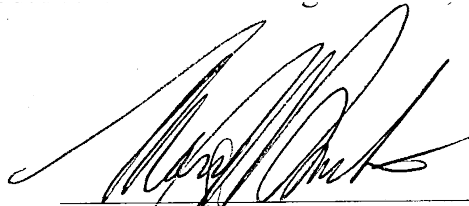
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Based on the foregoing, the petition is granted; petitioner is directed to submit a proposed order within 20 days hereof. Given the foregoing, Motion ## 2, 3, 4, and 5 are denied as moot.

Dated: April 16, 2021
White Plains, New York



HON. MARY H. SMITH
Justice of the Supreme Court

Supreme Court of the State of New York

Appellate Division: Second Judicial Department

Informational Statement (Pursuant to 22 NYCRR 1250.3 [a]) - Civil

Case Title: Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.		For Court of Original Instance
Robert F. Kennedy, Jr. <p style="text-align: center;">- against -</p> Kos Media, LLC d/b/a Daily Kos		Date Notice of Appeal Filed
		For Appellate Division
Case Type	<input type="checkbox"/> Civil Action <input type="checkbox"/> CPLR article 75 Arbitration <input type="checkbox"/> Action Commenced under CPLR 214-g	<input type="checkbox"/> CPLR article 78 Proceeding <input checked="" type="checkbox"/> Special Proceeding Other <input type="checkbox"/> Habeas Corpus Proceeding
Filing Type	<input checked="" type="checkbox"/> Appeal <input type="checkbox"/> Original Proceedings <input type="checkbox"/> CPLR Article 78 <input type="checkbox"/> Eminent Domain <input type="checkbox"/> Labor Law 220 or 220-b <input type="checkbox"/> Public Officers Law § 36 <input type="checkbox"/> Real Property Tax Law § 1278	
Nature of Suit: Check up to three of the following categories which best reflect the nature of the case.		
<input type="checkbox"/> Administrative Review	<input type="checkbox"/> Business Relationships	<input type="checkbox"/> Commercial
<input type="checkbox"/> Declaratory Judgment	<input type="checkbox"/> Domestic Relations	<input type="checkbox"/> Election Law
<input type="checkbox"/> Family Court	<input type="checkbox"/> Mortgage Foreclosure	<input checked="" type="checkbox"/> Miscellaneous
<input type="checkbox"/> Real Property (other than foreclosure)	<input type="checkbox"/> Statutory	<input type="checkbox"/> Taxation
		<input type="checkbox"/> Contracts
		<input type="checkbox"/> Estate Matters
		<input type="checkbox"/> Prisoner Discipline & Parole
		<input type="checkbox"/> Torts

Informational Statement - Civil

Appeal	
Paper Appealed From (Check one only):	If an appeal has been taken from more than one order or judgment by the filing of this notice of appeal, please indicate the below information for each such order or judgment appealed from on a separate sheet of paper.
<input type="checkbox"/> Amended Decree <input type="checkbox"/> Amended Judgement <input type="checkbox"/> Amended Order <input checked="" type="checkbox"/> Decision <input type="checkbox"/> Decree	<input type="checkbox"/> Determination <input type="checkbox"/> Finding <input type="checkbox"/> Interlocutory Decree <input type="checkbox"/> Interlocutory Judgment <input type="checkbox"/> Judgment
<input type="checkbox"/> Order <input type="checkbox"/> Order & Judgment <input type="checkbox"/> Partial Decree <input type="checkbox"/> Resettled Decree <input type="checkbox"/> Resettled Judgment	<input type="checkbox"/> Resettled Order <input type="checkbox"/> Ruling <input type="checkbox"/> Other (specify):
Court: Supreme Court	County: Westchester
Dated: 04/16/2021	Entered: 04/16/2021
Judge (name in full): Hon. Mary H. Smith	Index No.: 65319/2020
Stage: <input type="checkbox"/> Interlocutory <input checked="" type="checkbox"/> Final <input type="checkbox"/> Post-Final	Trial: <input type="checkbox"/> Yes <input type="checkbox"/> No If Yes: <input type="checkbox"/> Jury <input type="checkbox"/> Non-Jury
Prior Unperfected Appeal and Related Case Information	
Are any appeals arising in the same action or proceeding currently pending in the court? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If Yes, please set forth the Appellate Division Case Number assigned to each such appeal.	
Where appropriate, indicate whether there is any related action or proceeding now in any court of this or any other jurisdiction, and if so, the status of the case:	
Original Proceeding	
Commenced by: <input checked="" type="checkbox"/> Order to Show Cause <input type="checkbox"/> Notice of Petition <input type="checkbox"/> Writ of Habeas Corpus	Date Filed: 11/30/2020
Statute authorizing commencement of proceeding in the Appellate Division: CPLR 5515	
Proceeding Transferred Pursuant to CPLR 7804(g)	
Court: Choose Court	County: Choose County
Judge (name in full):	Order of Transfer Date:
CPLR 5704 Review of Ex Parte Order:	
Court: Choose Court	County: Choose County
Judge (name in full):	Dated:
Description of Appeal, Proceeding or Application and Statement of Issues	
Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.	
The Trial Court granted Petitioner's request under CPLR 3102(c) for disclosure of identifying information of an anonymous blogger on Respondent's website, and denied Respondent's motion for a protective order and sanctions.	

Informational Statement - Civil

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review, the grounds for reversal, or modification to be advanced and the specific relief sought on appeal.

1. Did the Trial Court err in deciding and ordering that Petitioner is entitled to disclosure of identifying information regarding the anonymous blogger on Respondent’s website.
2. Did the Trial Court err in dismissing Respondent’s motion for sanctions and motion for a protective order against disclosing the name of the anonymous blogger.

The grounds for reversal are that the Trial Court used an improper standard of review, failed to consider the Respondent’s interests in anonymity, and improperly concluded that Petitioner had made out a prima facie case of defamation and as such disclosure is not warranted.

Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party’s name and his, her, or its status in this court.

No.	Party Name	Original Status	Appellate Division Status
1	Robert F. Kennedy, Jr.	Petitioner	Petitioner
2	Kos Media, LLC d/b/a Daily Kos	Respondent	Respondent-Appellant
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Attorney Information

Instructions: Fill in the names of the attorneys or firms for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

Attorney/Firm Name: Nathaniel K. Charny/Charny & Wheeler P.C.

Address: 9 West Market Street

City: Rhinebeck State: NY Zip: 12572 Telephone No: 845-876-7500

E-mail Address: ncharny@charnywheeler.com

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above): 2

Attorney/Firm Name: Craig Wenner/Peter Skinner/Boies Schiller Flexner LLP

Address: 55 Hudson Yards

City: New York State: NY Zip: 10001 Telephone No: 212-446-2300

E-mail Address: cwenner@bsflp.com/pskinner@bsflp.com

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above): 1

Attorney/Firm Name:

Address:

City: State: Zip: Telephone No:

E-mail Address:

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

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Attorney/Firm Name:

Address:

City: State: Zip: Telephone No:

E-mail Address:

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Attorney/Firm Name:

Address:

City: State: Zip: Telephone No:

E-mail Address:

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

In the Matter of the Petition of

ROBERT F. KENNEDY, JR.,

Petitioner,

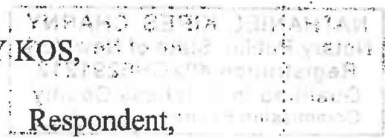
For an Order Pursuant to Section 3102(c) of the Civil
Practice Law and Rules to compel pre-action disclosure
from:

AFFIDAVIT OF SERVICE

Index No. 65319/2020

KOS MEDIA, LLC d/b/a DAILY KOS,

Respondent,



of the identity of the defendants JOHN DOE(s) being
unknown to the Petitioner, in an action to be
commenced.

STATE OF NEW YORK)
) ss.:
COUNTY OF DUTCHESS)

Catherine M. Kelly-Skeen, being duly sworn deposes and states the following under the penalties of perjury:

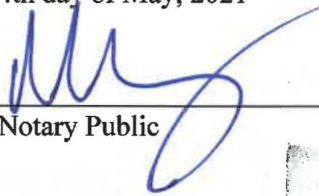
I am not a party to the action, am over 18 years of age and reside in Dutchess County, New York. On the 4th day of May, 2021, I served a true copy of: Notice of Appeal and Informational Statement by mailing the same by First Class Mail, with postage prepaid thereon, in a post-office or official depository of the U.S. Postal Service within the State of New York, to the petitioner addressed as indicated below:

Craig Wenner, Esq.
Peter Skinner, Esq.
Boies Schiller Flexner LLP
55 Hudson Yards
New York, New York 10001

Catherine M. Kelly-Skeen

State of New York)
) ss.:
County of Dutchess)

Sworn to before me this
4th day of May, 2021



Notary Public

NATHANIEL KIRES CHARNY
Notary Public, State of New York
Registration #02CH6291212
Qualified in Dutchess County
Commission Expires 10-28-21